

# Entrepreneurial mass litigation

BALANCING THE BUILDING BLOCKS

I. Tillema

Entrepreneurial Mass Litigation  
Balancing the building blocks

Commerciële motieven in collectieve acties  
Bouwstenen voor balans

Proefschrift ter verkrijging van de graad van doctor aan de  
Erasmus Universiteit Rotterdam op gezag van  
de rector magnificus  
Prof.dr. R.C.M.E. Engels  
en volgens besluit van het College voor Promoties

De openbare verdediging zal plaatsvinden op

18 januari 2019 om 13.30 uur  
door

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geboren te Groningen

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# Table of Contents

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<b>List of abbreviations</b>	<b>ix</b>
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<b>Preface</b>	<b>xii</b>
----------------	------------

## **Introduction to the research**

<b>1</b>	<b>IN SEARCH OF A BALANCED CONTRIBUTION OF ENTREPRENEURIAL PARTIES TO MASS LITIGATION.....</b>	<b>2</b>
1.1	Research theme: context and background	2
1.1.1	Three examples	2
1.1.2	The emergence of entrepreneurial mass litigation	3
1.2	Research design	4
1.2.1	The aim of the research	4
1.2.2	The research question	6
1.2.3	Terminology	7
1.2.3.1	Collective redress	7
1.2.3.2	Entrepreneurial mass litigation	8
1.2.4	Methodology	9
1.2.4.1	Theoretical study	9
1.2.4.2	Legal study	10
1.3	Structure of the book	11

## **Part I: Normative and Theoretical Framework**

<b>2</b>	<b>COLLECTIVE REDRESS MECHANISMS AND THEIR POLICY OBJECTIVES.....</b>	<b>15</b>
2.1	Introduction	15
2.2	The development of collective redress in the EU and the selected jurisdictions	15
2.2.1	European Union	15
2.2.2	Germany	22
2.2.3	England and Wales	29
2.2.4	The Netherlands	34
2.3	Theoretical underpinning of collective redress	39
2.4	The objectives of collective redress mechanisms	42
2.4.1	Modify behaviour, individual (compensatory) redress, and efficiency	42
2.4.2	The three main objectives and access to justice	44
2.4.3	Clustering the objectives, and trade-offs	44
2.5	Summary: the collective redress mechanisms and their objectives	45
<b>3</b>	<b>ENTREPRENEURIAL MASS LITIGATION AND ITS POTENTIAL BENEFITS AND DRAWBACKS.....</b>	<b>48</b>
3.1	Introduction	48
3.2	The development of entrepreneurial mass litigation	48
3.2.1	The origins	48
3.2.2	In Europe	51
3.3	The types of entrepreneurial parties and their funding techniques	55

3.4	The upside: potential benefits	59
3.4.1	Access to justice	59
3.4.2	Competition	61
3.4.3	Quality of claims	63
3.4.4	(E)quality of arms	65
3.4.5	Alignment of interests	66
3.5	The dark side of the coin: potential risks	68
3.5.1	Claim culture	68
3.5.2	Inefficient competition	72
3.5.3	Adverse selection (cherry picking)	74
3.5.4	Abusive behaviour	75
3.5.5	Conflict of interests	78
	3.5.5.1 Two types of inadequate settlements	78
	3.5.5.2 Premature settlement	79
	3.5.5.3 Collusive settlement	80
3.6	Benefits, drawbacks and the objectives of collective redress	81

## Part II: Legal and Practical Framework

4	GERMANY .....	87
4.1	Setting the scene: some essential features of the civil justice landscape	87
4.2	The regulation and supervision of the legal services market	89
4.3	Litigation costs and costs shifting	92
4.3.1	Introduction	92
4.3.2	Litigation costs	92
4.3.3	Security for costs	95
4.3.4	Costs shifting	96
4.3.5	Recovery of litigation funding costs	98
4.3.6	Liability for adverse costs	99
4.4	Private litigation funding	100
4.4.1	Introduction	100
4.4.2	Attorney litigation funding	101
4.4.3	Third-party litigation funding	102
4.4.4	Special purpose vehicles: the assignment model	105
4.5	Relevant rules and features of the collective redress mechanisms	107
4.5.1	Briefly brushing up	107
4.5.2	Joinder, consolidation and a test case	107
4.5.3	Representative actions	109
	4.5.3.1 Designated entities	109
	4.5.3.2 Action for an injunction ( <i>Unterlassungsklage</i> )	110
	4.5.3.3 Action for skimming-off illicit gains ( <i>Gewinn- and Vorteilabschöpfungsklage</i> )	112
4.5.4	Specific group action/a test case: KapMuG	114
4.5.5	Assignment model	117
	4.5.5.1 By a consumer association ( <i>Musterklage</i> and <i>Sammelklage</i> )	117

	4.5.5.2 By a special purpose vehicle ( <i>Rechtsverfolgungsgesellschaft</i> )	118
4.6	Summary: rules and features that shape German entrepreneurial mass litigation	121
5	ENGLAND AND WALES.....	126
5.1	Setting the scene: some essential features of the civil justice landscape	126
5.2	The regulation and supervision of the legal services market	129
5.2.1	Introduction	129
5.2.2	Solicitors and barristers	129
5.2.3	Claims Management Companies	133
5.2.4	Third-party litigation funders	135
5.3	Litigation costs and costs shifting	139
5.3.1	Introduction	139
5.3.2	Litigation costs	140
5.3.2.1	Court charges and lawyers' fees	140
5.3.2.2	Measure I: costs management and budgeting	142
5.3.2.3	Measure II: fixed recoverable costs	143
5.3.2.4	Measure III: costs capping and protective costs order	144
5.3.3	Security for costs	146
5.3.4	Costs shifting	149
5.3.4.1	The loser pays rule	149
5.3.4.2	Does the loser indeed pay?	150
5.3.4.3	How much does the loser pay?	152
5.3.5	Recovery of litigation funding costs	154
5.3.5.1	Introduction	154
5.3.5.2	CFA success fee	154
5.3.5.3	DBA contingency fee	159
5.3.5.4	LFA contingency fee	160
5.3.5.5	Other costs of litigation funding	161
5.3.6	Liability for adverse costs	162
5.3.6.1	Liability of class members	162
5.3.6.2	Liability of litigation funders	163
5.4	Private litigation funding	167
5.4.1	Introduction	167
5.4.2	Maintenance and champerty	168
5.4.3	Lawyers' litigation funding	169
5.4.3.1	Conditional fee arrangement and after-the-event insurance	169
5.4.3.2	Damages-based agreements	171
5.4.4	Claims Management Companies	174
5.4.5	Third-party litigation funding	176
5.4.6	Special purpose vehicles: the assignment model	182
5.4.7	Contingency Legal Aid Fund	184
5.5	Relevant rules and features of the collective redress mechanisms	185
5.5.1	Joinder, consolidation, and a test case	185
5.5.2	Representative action	189
5.5.3	Group litigation order	192

	5.5.4	Assignment model	196
	5.5.5	Consumer law: an enforcement order and enhanced consumer measures	197
	5.5.6	Competition law: collective proceedings	199
	5.5.7	Competition law: collective settlement	206
5.6		Summary: rules and features that shape English entrepreneurial mass litigation	207
6		THE NETHERLANDS .....	212
6.1		Setting the scene: some essential features of the civil justice landscape	212
6.2		The regulation and supervision of the legal services market	214
6.3		Litigation costs and costs shifting	218
	6.3.1	Introduction	218
	6.3.2	Litigation costs	218
	6.3.3	Security for costs	220
	6.3.4	Costs shifting	220
	6.3.5	Recovery of litigation funding costs	224
	6.3.6	Liability for adverse costs	226
6.4		Private litigation funding	227
	6.4.1	Introduction	227
	6.4.2	Attorney litigation funding	228
	6.4.3	Third-party litigation funding	231
	6.4.4	Special purpose vehicles	232
	6.4.4.1	Bundled assignments or mandates	232
	6.4.4.2	Representative organizations	233
6.5		Relevant rules and features of the collective redress mechanisms	235
	6.5.1	Briefly brushing up	235
	6.5.2	Joinder, consolidation and a test case	235
	6.5.3	Assignment (or mandate) model	236
	6.5.4	Collective action	238
	6.5.4.1	The legal framework	238
	6.5.4.2	The practical operation	240
	6.5.5	Collective action for damages	244
	6.5.6	WCAM	246
	6.5.6.1	The legal framework	246
	6.5.6.2	The practical operation	247
6.6		Summary: rules and features that shape Dutch entrepreneurial mass litigation	252

### Part III: Analysis, Conclusion and Summary

7		ANALYSIS AND CONCLUSION .....	259
7.1		Introduction	259
7.2		Policy objectives and potential benefits and drawbacks	260
	7.2.1	The policy objectives of collective redress mechanisms	260
	7.2.2	The potential benefits and drawbacks of entrepreneurial mass litigation	261

7.2.3	The first overview: the beneficial or disadvantageous effects of entrepreneurial mass litigation	264
7.3	The selected jurisdictions' rules and features that are related to entrepreneurial mass litigation	264
7.3.1	Setting the scene: some essentials of the civil justice landscapes	264
7.3.2	The legal services markets	265
7.3.3	Litigation costs and costs shifting	267
7.3.4	Private litigation funding	268
7.3.5	Specificities and safeguards of the collective redress mechanisms	270
7.3.6	The second overview: the distilled rules and features	272
7.4	The relevant conditions for the contribution of entrepreneurial parties to the chosen objectives of collective redress	274
7.4.1	Objective A: deterrence	274
7.4.2	Objective B: compensation	275
7.4.3	Objective C: efficiency	276
7.4.4	The third overview: the building blocks of entrepreneurial mass litigation	276
7.5	Envoi	281
8	SUMMARY .....	282

## **Bibliography**

POLICY DOCUMENTS .....	287
Europe	287
European Union	287
Germany	290
England and Wales	291
Netherlands	292
CASE LAW .....	295
Court of Justice of the European Union	295
European Court of Human Rights	295
Germany	295
England and Wales	295
Netherlands	297
LITERATURE.....	300



## List of abbreviations

ADR	Alternative Dispute Resolution
AFM	Dutch financial markets authority ( <i>Autoriteit Financiële Markten</i> )
AGBG	Act on General Terms and Conditions ( <i>Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen</i> )
ALF	Association of Litigation Funders
ATE	After-the-event legal expenses insurance
BaFin	German Federal Financial Supervisory Authority ( <i>Bundesanstalt für Finanzdienstleistungsaufsicht</i> )
BIS	Department for Business Innovation & Skills
BGB	German Civil Code ( <i>Bürgerliches Gesetzbuch</i> )
BGBI.	German Federal Law Gazette ( <i>Bundesgesetzblatt</i> )
BGH	German Supreme Court ( <i>Bundesgerichtshof</i> )
BRAO	Federal Attorney's Act ( <i>Bundesrechtsanwaltsordnung</i> )
BVerG	German Federal Constitutional Court ( <i>Bundesverfassungsgericht</i> )
BW	Dutch Civil Code ( <i>Burgerlijk Wetboek</i> )
CA	Competition Act
CAPR	Conduct of Authorised Persons Rules
CAT	Competition Appeal Tribunal
CFA	Conditional Fee Agreement
CLAF	Contingency Legal Aid Fund
CILEx	Chartered Institute of Legal Executives
CJC	Civil Justice Counsel
CLSA	Courts and Legal Services Act
CMA	Competition and Markets Authority
CMC	Claims Management Company
CMR	Claims Management Regulator
CPR	Civil Procedure Rules
CRA	Consumer Rights Act
DBA	Damages-Based Agreement
DG SANCO	European Commission Directorate General for Health and Consumers
DG COMP	European Commission Directorate General for Competition
DG JUST	European Commission Directorate General for Justice, Consumers and Gender Equality

DTI	Department of Trade and Industry
EC (1)	European Commission
EC (2)	European Community
ECHR	European Court of Human Rights
ECJ	Court of Justice of the European Union
ECM	Enhanced consumer measure
EEC	European Economic Community
EESC	European Economic Social Committee
EO	Enforcement Order
EP	Entrepreneurial Party
FCA	Financial Conduct Authority
GG	German Federal Constitution ( <i>Grundgesetz für die Bundesrepublik Deutschland</i> )
GKG	Court Charges Act ( <i>Gerichtskostengesetz</i> )
GLO	Group Litigation Order
GVG	Constitution of the Courts Act ( <i>Gerichtsverfassungsgesetz</i> )
GWB	Act against restraints of competition ( <i>Gesetz gegen Wettbewerbsbeschränkungen</i> )
Hof	Dutch Court of Appeal ( <i>Gerechtshof</i> )
HR	Dutch Supreme Court ( <i>Hoge Raad</i> )
KapMuG	Capital Investors' Model Proceeding Act ( <i>Kapitalanleger Musterverfahren Gesetz</i> )
KiFiD	Financial Services Complaints Tribunal ( <i>Klachteninstituut Financiële Dienstverlening</i> )
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act
LEI	Legal Expenses Insurance
LFA	Litigation Funding Agreement
LG	German State District Court ( <i>Landgericht</i> )
LSA	Legal Services Act
OFT	Office of Fair Trading
OJ	Official Journal of the European Union
OLG	German Court of Appeal ( <i>Oberlandesgericht</i> )
PD	Practice Direction
PPI	Payment Protection Insurance
Rb.	Dutch District Court ( <i>Rechtbank</i> )
RDG	Legal Services Act ( <i>Rechtsdienstleistungsgesetz</i> )
RDV	Legal Services Ordinance ( <i>Rechtsdienstleistungsverordnung</i> )
RO	Representative Organization

Rv	Dutch Code of Civil Procedure ( <i>Wetboek van Burgerlijke Rechtsvordering</i> )
RVG	Attorney Remuneration Act ( <i>Rechtsanwaltsvergütungsgesetz</i> )
SLAS	Supplementary Legal Aid Scheme
SPV	Special Purpose Vehicle
SRA	Solicitors Regulation Authority
Stb.	Dutch Law Gazette ( <i>Staatsblad</i> )
TPF	Third-party litigation funding
UK	United Kingdom
UKlaG	Act on Injunctive Relief ( <i>Unterlassungsklagegesetz</i> )
US(A)	United States (of America)
UWG	Act against unfair competition ( <i>Gesetz gegen den unlauteren Wettbewerb</i> )
VV	Remuneration schedule ( <i>Vergütungsverzeichnis</i> )
WCAM	Collective Mass Claims Settlement Act ( <i>Wet Collectieve Afwikkeling van Massaschade</i> )
Wft	Financial Supervision Act ( <i>Wet op het financieel toezicht</i> )
ZPO	German Code of Civil Procedure ( <i>Zivilprozessordnung</i> )

## Preface

*'Thank you for the music'*<sup>1</sup>

Zo, het zit erop. Aan het begin van dit boek bedank ik graag degenen die de totstandkoming ervan mede mogelijk maakten. Allereerst Willem en Siewert, oneindig veel dank voor het vertrouwen, de vrijheid en jullie geduld. Voor het verruimen van mijn blik, de wijze lessen en het voorkomen van mijn verhuizing naar Paesens Moddergat. Astrid, thank you for the opportunity, and your trust and kindness. The visits to Konstanz were truly inspiring and memorable. Chris, thank you for your thought-provoking insights and for the hospitality during my stay in Oxford. Michael en Louis, veel dank voor de eerste hulp bij rechtseconomische ongelukken. Alle experts 'in het veld' die mij in de loop der jaren zo vriendelijk ontvingen, bedankt voor het delen van uw kennis en ervaring. Ze kleurden op waardevolle wijze mijn begrip van the law in the books. Veel dank ook aan Stichting OCA voor de financiële ondersteuning van dit onderzoek, en aan Peter Morris voor de grondige redactie van de Engelstalige tekst.

Lieve (oud-)collega's, bedankt voor jullie steun, de samenwerking en het lachen. Lieve paranimfen Isa, Henriette en Mieke, zonder jullie was ik gillend gek geworden, bedankt! Lieve vrienden, veel dank voor alle etentjes, uitjes en overige pogingen om de wereld een beetje leuker te maken. In het bijzonder Eliza, Ingrid, Isa, Jette, Maria en Marieke, bedankt dat jullie altijd net zo lang blijven faxen totdat ik reageer.

Allerliefste heit, mem, Sjoukje, Jan-Mendelt, Christina, Magda, Maurice, Aidan, Lena, Kaia, Jente, Harper en Jonne, tige tank voor jullie steun, toeverlaat en cabaret. Weer of geen weer, elke dag met jullie is een kadoetje. Gracias a mi familia política, por acogerme, cuidarme y por todos los albariños. Y al final, Roberto, thank you for all the smoothies and your unconditional and everlasting smile. You can make any cloud disappear. Esto es para ti.

This research has been made possible by funding from Stichting OCA. The thesis does not necessarily reflect the views of the foundation or its board. The author is not affiliated with an entrepreneurial party or otherwise involved in mass litigation practice.

The research was closed on 1 December 2017. Later developments have been taken into account occasionally.

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<sup>1</sup> Benny Andersson & Björn Ulvaeus.

## **Introduction to the research**

## 1 In search of a balanced contribution of entrepreneurial parties to mass litigation

*‘The current wave of deregulation and market liberalization in Europe has had major repercussions for the prospect of litigated forms of collective redress. (...) one would have to be almost churlish not to marvel at the liberalizing spirit sweeping the continent. And, yet, one need spend only a few minutes in conversations with European reformers before the proverbial ‘but’ enters the discourse, as in, ‘But, of course, we shall not have American-style class actions’. At this point, all participants nod sagely, confident that collective actions, representative actions, group actions and a host of other aggregative arrangements can bring all the benefits of fair and efficient resolution to disputes without the dreaded world of American entrepreneurial lawyering. And no doubt the American entrepreneurial ways must be resisted and will be resisted fully, in much the same way that Europe has held off the unwelcome presence of McDonalds or Starbucks in its elegant piazzas. To this dignified and self-assured conversation we bring a simple but unwelcome question: Really? (...) Our concern is that what appears as an apparent cultural revulsion at accepting the reality of legal enforcement as entrepreneurial activity may leave the reforms without the necessary agents of implementation.’<sup>1</sup>*

### 1.1 Research theme: context and background

#### 1.1.1 Three examples

Cartel Damage Claims (CDC) is a private company that specializes in enforcing claims for damages that result from competition law infringements. It does so by purchasing claims from a multitude of cartel victims, aggregating these claims, and then, in its own name, asserting the joint claims in and/or out of court. In exchange for pursuing the claims and in the case of success, CDC receives a percentage of any damages it has obtained. In the case of loss, CDC bears the litigation costs, including the adverse costs order. Thus, CDC takes over the litigation risks. Since its establishment in 2002, CDC has filed bundled claims at various courts in Europe; inter alia, in Germany and the Netherlands. In both jurisdictions, one of the questions that has arisen in court is whether CDC’s business model is consistent with national law. Whereas, so far, the Dutch courts have affirmed CDC’s practice, the German courts have deemed the assignments at hand to be contrary to public policy.<sup>2</sup>

In 2006, the tanker Probo Koala illegally dumped 528 tonnes of chemical waste off the Ivory Coast, allegedly injuring thousands of residents. A few months later, around 30,000 claimants filed a group action (GLO) against the Trafigura group before the London High Court. All claimants had instructed the law firm that acted on their behalf on a conditional fee basis: if the claimants lost, they would pay no fee, if they won, the lawyers would claim their regular fee on an hourly basis including an uplift (success fee). In addition, to cover the risk of having to pay Trafigura’s costs in the case of loss, the claimants took out after-the-event insurance. At that time, under English law, claimants could recover both the success fee and the insurance premium from defendants in the case of success. In 2009, the

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<sup>1</sup> Issacharoff & Miller 2012, p. 37-38.

<sup>2</sup> The cases are discussed more elaborately in sections 4.5.5.2 and 6.5.3.

case was settled when Trafigura agreed to pay damages of £ 30 million. The court approved the terms of the settlement agreement, including those that stated, in short, that Trafigura would pay the claimants' costs. However, the bill of the claimants' law firm 'sent shockwaves through the profession' as the costs were calculated at £ 105 million, including a 100% fee uplift of the £ 45 million lawyers' fees and the ATE insurance premium of £ 9 million.<sup>3</sup> Trafigura decided to contest the fees and discuss the bill before a costs judge. In 2011, the London Court of Appeal upheld the Senior Costs Judge's ruling to cut the fee uplift to 58%, but to allow the recoverability of the ATE premium as billed.<sup>4</sup>

In October 2009, a Dutch court declared the privately owned DSB Bank insolvent. Meanwhile, a number of interest groups had emerged, accusing the bank of misselling financial products such as endowment policies. All of them stated that they wished to protect the interests of the aggrieved parties, but the manner in which they carried out this practice varied: from rendering support groups to drafting damage reports and individual or collective litigation. To fund their activities, some organizations charged membership fees and/or received donations, others (also) worked on a contingency fee basis. The organizations usually accompanied their activities by appearing in various media, such as the broadcasts of popular consumer programmes. The amount of claimants signing up with these interest groups was important, since they needed a critical mass to fund their actions and become the administrators' most important negotiation partner. Hence, some organizations joined forces. In 2011, the administrators and three representative organizations reached a settlement, which the Amsterdam Court of Appeal declared binding in 2014, pursuant to the Collective Mass Claims Settlement Act (WCAM). The settlement led to the dissolution of some organizations, while others set out to incite aggrieved parties to reject the settlement (opt out), claiming that they would receive better compensation through individual actions.<sup>5</sup>

### **1.1.2 The emergence of entrepreneurial mass litigation**

As the examples show, mass disputes can concern various areas of law and can be dealt with through a range of legal instruments. In the US, class actions have been an important instrument to resolve mass disputes since the amendment of Rule 23 in the Federal Rules of Civil Procedure in 1966.<sup>6</sup> Under the broader – and better marketable – heading of collective redress, the topic has been on the political agenda of the European Union for the past few decades. Nowadays, most European member states have introduced some type of collective redress mechanism. To undertake the pursuit of collective redress, the European Commission and many member states strongly rely upon non-profit (qualified) representative bodies, such as consumer organizations, as a more trusted alternative to the US entrepreneurial lawyer. This focus is incited by, inter alia, the fear that commerce-driven parties may trigger an 'American-style compensation culture', as entrepreneurial lawyers are believed to primarily pursue their own interests. According to a passage in a DG SANCO memo:

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<sup>3</sup> 'Leigh Day makes 'staggeringly high' costs order of £105m for Trafigura role' (16 May 2010), *The Lawyer*.

<sup>4</sup> See *Motto & Ors v. Trafigura & Trafigura Beheer* [2011] EWCA Civ 1150 [2012] 1 W.L.R. 657 (CA). The case is discussed more elaborately in sections 5.3.5.2 and 5.3.5.5.

<sup>5</sup> The case is discussed more elaborately in section 6.5.4.2.

<sup>6</sup> For the history of American (and English) group litigation as from the 12<sup>th</sup> century, see Yeazell 1987. See also Hensler e.a. 2000, Chapter 2, Calabresi 2012, p. 12 ff, Marcus 2013, and Coffee 2015, p. 52 ff.

*'US style class action is not envisaged. EU legal systems are very different from the US legal system which is the result of "toxic cocktail" - a combination of several elements (punitive damages, contingency fees, opt-out, pre-trial discovery procedures). (...) This combination of elements - "toxic cocktail" - should not be introduced in Europe.'*<sup>7</sup>

However, any mechanism is pointless without an initiator that pursues collective redress. In a study on the effectiveness and efficiency of existing collective redress mechanisms in the EU, one of the main conclusions was that the financing of collective actions is a significant obstacle for their use.<sup>8</sup> For various reasons, such as the high litigation costs and risks given the scale and complexity of mass litigation, potential intermediaries might not be able or willing to pursue (all) mass claims.

Despite policy makers' focus on consumer and other non-profit organizations, various types of entrepreneurial parties have entered the European mass litigation market in recent years, attempting to seize the opportunities that collective redress might bring. These private parties have been breaking new ground by deploying already existing funding strategies to mass litigation, such as assignment or contingency fee arrangements. However, regardless of the type of entrepreneur, its mere presence adds another key actor to litigation, one that is or might be pursuing its own commercial interest. The concern that has been expressed is that this might be in conflict with the interest of (absent) group members, and/or defendants, and/or society at large. On the other hand, the literature suggests that a financial incentive for a (third) party to bring an action might be necessary for a well-functioning collective redress mechanism.

## **1.2 Research design**

### **1.2.1 The aim of the research**

The funding of collective redress is a key factor for the mechanism's development and practical functioning.<sup>9</sup> As a complement to (semi-)public enforcement, legal aid insurance and class members' own resources, entrepreneurial funding might very well be part of the way forward. Although collective redress is a relatively recent phenomenon in Europe, it has created a market that entrepreneurial parties have started to explore – the extent to which depending on national legal frameworks. Should courts and/or legislators (further) address this practice, and if so, how? Are they, as Hensler has put it, 'in the position of playing "catch up" with private actors'?<sup>10</sup> The legal and political challenge seems to be to fulfil the objectives of collective redress mechanisms without also creating incentives for abusive behaviour. This debate predominantly builds upon American experiences, particularly the negative ones. These experiences obviously provide valuable information, but caution is required given the difference between the legal systems and cultures in the USA and Europe.

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<sup>7</sup> Commission of the EC – DG SANCO, *Green Paper on Consumer Collective Redress – Questions and Answers*, 27 November 2008, MEMO/08/741, under 9.

<sup>8</sup> Civic Consulting & Oxford Economic, *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union. Final Report*, Berlin 2008, p. 4 and 66 ff.

<sup>9</sup> See, similar, Tzankova 2012, Madaus 2012, Hodges & Stadler 2013, Voet 2015 and Stadler 2017.

<sup>10</sup> Hensler 2011, p. 323.



The body of literature on European collective redress and its funding mechanisms is growing, but there is considerable scope for further research.<sup>11</sup> This research project will contribute to the body of knowledge by linking the merits and demerits of entrepreneurial funding with three European member states' legal regimes. As entrepreneurial mass litigation is a relatively new phenomenon and a moving target, it is impossible to paint a full picture. By mapping (potential) scenarios of entrepreneurial mass litigation and exploring the German, English, and Dutch legal and practical context in which such scenarios would take place, the research project seeks to a) appraise the potential benefits and drawbacks of entrepreneurial mass litigation within the context of these European jurisdictions' legal traditions, and b) inventorise the particular rules and features that might affect entrepreneurial mass litigation in light of the chosen objectives of collective redress. Therewith, the study aims to contribute to the political, regulatory or judicial process of accurately weighing and balancing the benefits and drawbacks of entrepreneurial mass litigation. The targeted audience, in addition to the academic arena, are national and EU policymakers, as well as supervisory bodies or courts that monitor or assess (the performance of) entrepreneurial parties in a specific situation or case. The findings might also be of interest to entrepreneurial parties and lawyers involved in collective redress.

The research is constructed on the assumption that there is a need for collective redress mechanisms. Although this need might be – and has been – challenged,<sup>12</sup> policy makers are increasingly (exploring the possibility of) designing options for aggrieved parties to obtain collective redress to solve enforcement deficits.<sup>13</sup> The added value of such mechanisms is my point of departure.<sup>14</sup> Furthermore, I assume that thresholds such as litigation costs and risks impede the actual functioning of collective redress mechanisms (and therewith the achievement of the underlying policy objectives), and that entrepreneurial parties may contribute to solving this threat.<sup>15</sup> Obviously, other solutions are thinkable. For instance, the 'loser pays' costs shifting rules could be abandoned,<sup>16</sup> parties could take out legal expenses insurance,<sup>17</sup> organize a crowdfunding initiative,<sup>18</sup> or the means and resources of (semi) public enforcers could be enhanced.<sup>19</sup> Such solutions will be touched upon in a side note where relevant. The focus of attention is entrepreneurial funding and its particular (de)merits, examined for compatibility with the objectives of collective redress mechanisms on its own merits, not in comparison to alternatives. Furthermore, as Silver has noted, 'the class action will always be a political football'.<sup>20</sup> This study

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<sup>11</sup> Cf. Hodges 2010, p. 718 and 725.

<sup>12</sup> See the European and national developments of collective redress as described in Chapter 2.

<sup>13</sup> Obviously there are other methods, such as public enforcement, small claims procedures, and ADR. See, for instance, Stuyck e.a. 2007, Hodges, Benohr & Creutzfeldt-Banda 2012, Weber 2014, Kramer & Kakiuchi 2015 and Hodges 2015.

<sup>14</sup> See Chapter 2.

<sup>15</sup> See Chapter 3.

<sup>16</sup> See, for instance, Keske, Renda & Van den Bergh 2010 and Visscher & Schepens 2010.

<sup>17</sup> See, for instance, Van Boom 2010a.

<sup>18</sup> See, for instance, Gomez 2015.

<sup>19</sup> See, for instance, Micklitz & Stadler 2005. In light of the currently predominant political climate, which with regard to civil litigation focuses on the principle of 'the user pays', this does not seem very realistic. See, similar, Madaus 2012.

<sup>20</sup> Silver 2003, p. 1429.

does not aim to prioritize or rank the objectives of collective redress. Ultimately, that is up to the political arena.

### **1.2.2 The research question**

To achieve the project's purpose, the research will address the following question: what conditions are relevant in assessing the likelihood of entrepreneurial parties contributing to the chosen objectives of collective redress?

The research question is composed of the following elements. As a means to achieve policy objectives, collective redress mechanisms have been put into place. As mentioned, entrepreneurial funding can, as an additional means, contribute to the functioning of the mechanisms and thus to achieving the policy objectives.<sup>21</sup> Means, however, usually come with both favourable and perverse (side-)effects. In this research project, the policy objectives of collective redress are used to qualify the potential effects of entrepreneurial funding as such. The research project does not answer questions such as what objective(s) should be pursued with regard to collective redress, what 'too many' cases in court are, or what 'too high' a remuneration for an entrepreneurial party is. These are either economic, moral or political questions. Rather, the research project takes a legal and practical approach. It departs from the existing policy objectives of collective redress mechanisms, places the risks and benefits of entrepreneurial mass litigation in this context, and from thereon describes what is happening in the law and on the ground in the three selected jurisdictions. Therewith, threats and opportunities (rules and features of the selected legal regimes) are identified that might affect the beneficial or disadvantageous effects of entrepreneurial mass litigation, which in turn can positively or negatively affect the objectives of collective redress mechanisms.

The research question thus comprises the following sub-questions:

1. What are the policy objectives of collective redress mechanisms in the selected jurisdictions and the European Union?
2. What are the benefits and drawbacks of entrepreneurial mass litigation and how do they affect the chosen policy objectives (positively or negatively)?
3. Which legal rules and features are closely connected with entrepreneurial mass litigation, and what do they entail in the selected jurisdictions?
4. To what extent do these rules and features (potentially) mediate the benefits and drawbacks of entrepreneurial mass litigation and affect the objectives of collective redress?

Both collective redress and litigation funding are terminology minefields. The only way to fully grasp what they entail is by studying the various mechanisms of collective redress. This research helps to do so, following the methodology as will be described in section 1.2.4. The following section defines the concepts of collective redress, mass litigation and entrepreneurial litigation in order to further frame the scope of the research.

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<sup>21</sup> Cf. Keske, Renda & Van den Bergh 2010 and Faure 2013.

### 1.2.3 Terminology

#### 1.2.3.1 Collective redress

In this research, I build on the definition of collective redress as introduced in 2013 by the European Commission. According to this definition, collective redress is a legal mechanism that ensures the possibility to claim the cessation of illegal behaviour (injunctive relief) or compensation (compensatory relief) collectively, by two or more natural or legal persons that claim to have been harmed in a mass harm situation or by an entity entitled to bring a representative action.<sup>22</sup> In addition to this definition, I also qualify as collective redress a mechanism that can provide for declaratory relief (a statement of the legal relationship between parties). Such relief can provide the basis for (collective) settlement negotiations or individual litigation to seek monetary compensation and can thus result in compensatory relief for the aggrieved parties. With a mass harm situation, I refer to one event or a multiplicity of events that allegedly has or have harmed two or more natural or legal persons (hereafter, the latter are also interchangeably referred to as aggrieved parties or class members).

This research employs the term collective redress freely interchangeably with the term mass litigation.<sup>23</sup> With these terms, I refer to the (semi-)court-based resolution of mass disputes. The disputes have arisen from domestic or cross-border infringements of private law, and are or can be brought by private bodies before a civil court with the intention of obtaining relief. Consequential to these limitations, the research does not cover – the funding of – ADR mechanisms or public enforcement.<sup>24</sup> As entrepreneurial parties make a recovery through awards of damages or financial settlement,<sup>25</sup> the research encompasses the collective redress of economic or financial loss, both substantial and scattered. Although the research also discusses disputes that have arisen from cross-border infringements, the research project does not discuss matters of private international law, international jurisdiction, cross-border recognition or forum shopping.<sup>26</sup>

Collective redress is an umbrella term that covers a diversity of mechanisms that can resolve mass disputes. The mechanisms differ per jurisdiction.<sup>27</sup> The definitions of the different instruments vary between the jurisdictions and between the different mechanisms, and a significant variety exists with

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<sup>22</sup> Recommendation 3 (a) of the Recommendation 2013/396/EU.

<sup>23</sup> The term collective action is applied with reference to certain specific actions, such as the Dutch collective action of section 3:305a BW, and the English collective action in competition law. Both qualify as a representative action, see hereafter, and section 2.2.4.

<sup>24</sup> Such as arbitration, *partie civile*, or dispute resolution by consumer or financial authorities, complaints tribunals or ombudsmen. See, for instance, Van Boom 2011, Hodges, Benohr & Creutzfeldt-Banda 2012; Voet 2013 and Weber 2014.

<sup>25</sup> Cf. Hodges, Peysner & Nurse 2012, p. 103-104. See section 1.2.3.2.

<sup>26</sup> See on these topics in the context of collective redress, for instance, Stadler 2011, Fairgrieve & Lein 2012, Kramer 2013, Stadler 2013a, Stadler 2014a, Bosters 2015.

<sup>27</sup> For an overview of the mechanisms in EU member states (but note that – to a certain extent – recent national reforms have rendered these overviews outdated), see Civic Consulting & Oxford Economic, *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union. Final Report*, Berlin 2008, p. 27 ff, and Directorate General for Internal Policies, *Overview of existing collective redress schemes in EU Member States*, July 2011, IP/A/IMCO/NT/2011-16, p. 13 ff. For some recent information, see Hess 2017, in particular Chapter 4, section 2.

regard to their goals and design, such as their scope of application, binding effect, standing to sue, the types of available remedies, the competent court, and the technique of including class members (opt-in or opt-out).<sup>28</sup> There are court proceedings that have been designed specifically for the resolution of mass disputes: group actions and representative actions. The proceedings in which claims of class members are combined into one action, brought by two or more class members, will be referred to as group action (this includes the mechanisms of the joinder of parties and the consolidation of claims). Deviating from the EC Recommendation, I define as a representative action an action brought by any representative – one or more class members or a representative entity, public or private, certified or not, entrepreneurial or non-profit – that acts on behalf of two or more aggrieved parties who do not necessarily know about or participate in the action.<sup>29</sup> Collective redress can also – formally or informally, depending on the national procedural rules – follow a test case in which one of the aggrieved parties brings a claim that is similar to many others. I also qualify as collective redress the action of a special purpose vehicle – with litigation being the special purpose – that has bundled two or more class members' assigned claims and pursues these claims in its own name, whereas, strictly speaking, the Recommendation does not address this type of action.<sup>30</sup> A combination of taking legal action both in and out of court is possible as well: pursuant to the Dutch WCAM procedure, the Amsterdam Court of Appeal can declare legally binding an out-of-court settlement that holds rights to compensation for aggrieved parties.<sup>31</sup> Finally, collective redress can take place through out-of-court (consensual) settlement.

### **1.2.3.2 Entrepreneurial mass litigation**

There are different ways to fund mass litigation. The funding techniques are closely related to the mechanism that is used to obtain collective redress,<sup>32</sup> and do not necessarily involve an entrepreneurial party. Aggrieved parties might share litigation costs, individually supported by legal aid, legal expenses insurance or otherwise, or a representative body might raise money through donations, membership fees or subsidies.<sup>33</sup> However, as mentioned, various types of entrepreneurial parties have entered the mass litigation market in the past few years. If allowed by national law, class members may conclude contingency fee (alike) arrangements with attorneys, litigation funders, special purpose vehicles or representative bodies. In return for investing in the action, such entrepreneurial party is (fully) remunerated only if the action is successful.

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<sup>28</sup> For an overview of the examined collective redress mechanisms and their main features, see section 2.5.

<sup>29</sup> Recommendation 3 (d) defines a representative action as an action which is brought by a representative entity, an ad hoc certified entity or a public authority on behalf and in the name of two or more natural or legal persons who claim to be exposed to the risk of suffering harm or to have been harmed in a mass harm situation whereas those persons are not parties to the proceedings.

<sup>30</sup> Cf. Stadler 2014, Tillema 2014 and Stadler 2017. See the first example in section 1.1.1.

<sup>31</sup> This action is qualified as a representative action, see section 2.5.

<sup>32</sup> Cf. Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, 2 April 2008, SEC(2008) 404, consideration 45.

<sup>33</sup> See also Kalajdzic, Cashman & Longmoore 2013, p. 99.

This research opts for a definition of entrepreneurial mass litigation that captures the aforementioned spectrum of funding arrangements.<sup>34</sup> It is defined as the non-recourse financing of (all or part of) the litigation costs by an entrepreneurial, private party that is otherwise unconnected with the mass damage event, with the aim of pursuing class members' claims that represent a monetary value, in return for i) a share of the proceeds of any award or settlement regardless of the amount of time it has spent in the case (*quota pars litis*), or ii) a normal, hourly fee uplifted with a percentage; either way, the (uplifted) fee is only payable upon success. This definition is similar to those of contingency respectively conditional fees, which are used in the context of funding by attorneys.<sup>35</sup> It is also similar to the definitions of third-party litigation funding.<sup>36</sup> In essence, the techniques are the same, but the entrepreneurial party differs.<sup>37</sup> In this research project, the entrepreneurial party can be an attorney, a third-party litigation funder or a special purpose vehicle.<sup>38</sup> Where necessary, the distinction is made between a funder that is involved in mass litigation as a party (a special purpose vehicle) and the one that is not (a third-party litigation funder or an attorney). This research does not address legal expenses insurance.<sup>39</sup>

Due to the definition employed, the research is limited to the funding of creditors' litigation costs; the funding of defendants' costs is omitted.<sup>40</sup> Creditors' costs can be subdivided into attorneys' fees, court fees, experts' costs, witnesses' costs, and secondary costs such as travel expenses. The costs covered may also include the costs award in case the claim is denied and the claimant is ordered to reimburse the defendant's costs (the adverse costs order).

The term lawyer is used to describe anyone qualified and authorised to practice law and provide legal advice. The term attorney is reserved for the lawyer that represents the claimant(s) in a case before the court. In Chapter 5 (England and Wales), the terms lawyer and attorney will, where necessary, be subdivided into solicitor or barrister.

## 1.2.4 Methodology

### 1.2.4.1 Theoretical study

Two studies will be conducted to address the research question 'What conditions are relevant in assessing the likelihood of entrepreneurial parties contributing to the chosen objectives of collective redress?' The first part of the research consists of a theoretical study that will establish a normative framework in order to qualify the rules and features of (entrepreneurial) mass litigation, which will be investigated in the second part of the research. This normative framework consists of the following two components.

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<sup>34</sup> The term entrepreneurial litigation is taken from Coffee 1987 and Coffee 2015.

<sup>35</sup> See, for instance, Hodges, Vogenauer & Tulibacka 2010 and De Mot, Faure & Visscher 2017.

<sup>36</sup> See Van Boom 2011, Veljanovski 2012, Hodges, Peysner & Nurse 2012, Rowles-Davies 2014 and Pirozzolo 2014.

<sup>37</sup> Cf. Keske, Renda & Van den Bergh 2010, p. 70, and Van Velthoven & Van Wijck 2016, p. 20.

<sup>38</sup> See also section 3.3.

<sup>39</sup> See, for instance, Van Boom 2010a and De Mot, Faure & Visscher 2017.

<sup>40</sup> See, for instance, Rowles-Davies 2014, p. 64-66.

I will first describe the development of collective redress in the selected jurisdictions (see hereafter): which objectives and aspirations of policy makers underlie the various mechanisms? The European Union developments are included in this overview, as they are intertwined with those at the national stage. Subsequently, those in Germany, England and Wales, and the Netherlands are addressed. Out of this overview, which is based on policy documents and a synopsis of the literature that theoretically underpins collective redress, I will identify the objectives of collective redress. These objectives establish the first half of the normative framework, and will also serve to qualify the (potential) effects of entrepreneurial mass litigation, that is, to determine which particular effects are favourable and which are not.

The second part of the research includes a literature study in order to describe the (potential) effects of entrepreneurial mass litigation; how might the incentives of third parties (mis)align with the interests of the aggrieved parties, defendants, and/or society? It includes legal doctrinal, law and economics, and empirical studies on entrepreneurial mass litigation in the USA and Australia (contingency fees, third-party funding and class actions). Their experiences will be used as a source of inspiration to further set out the framework. For instance, in the USA, contingency fee arrangements and class actions have been investigated from different academic angles. Europe can take into consideration the lessons learnt in the USA, keeping in mind the substantial differences between the legal systems, cultures and traditions. For instance, the American class action regulations have a different design and concern different key players<sup>41</sup> who operate in different legal regimes. This influences (the implications of) the incentives or behaviour.<sup>42</sup> Notably, the following American rules and features affect the functioning of class actions driven by entrepreneurial lawyers, and do not, or to a lesser degree, exist in most European member states: no or one-way costs shifting, jury trial, elected judges, punitive or treble damages, elaborate – costly – discovery, the lack of public legal aid funding and less social security provisions, a large focus on private enforcement, a variety of federal and state laws, and – possibly – a different attitude towards litigation.<sup>43</sup> It is not always possible to attribute the incentive to the device, the legal system or the entrepreneur's activity. Nevertheless, general observations can be made, particularly because in essence all forms of remuneration or funding concern the 'own interest' of the entrepreneurial party. Where necessary, the difference in design and the (potential) influence thereof on the functioning of the entrepreneurial party will be addressed.

This second dimension will lead to a second set of review criteria, which serve as the other half of the normative framework to assess entrepreneurial mass litigation. The first and second set of review criteria will be presented as a risk and benefit 'checklist' against the backdrop of the objectives of collective redress mechanisms.

#### **1.2.4.2 Legal study**

Since entrepreneurial parties do not operate in a vacuum and their functioning depends on the specifics of a national legal system, the second part of the research consists of a legal study that maps

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<sup>41</sup> Attorney/class counsel, lead plaintiff and (absent) class members.

<sup>42</sup> Other collective redress mechanisms exist, but will not be discussed.

<sup>43</sup> See, for instance, Yeazell 1987, Markesinis 1990, Hensler 2000, Coffee 2010, p. 291, Ramseyer & Rasmusen 2010, Hodges 2011, p. 103, and Coffee 2015, p. 9 ff.

and comparatively observes the context and structure of entrepreneurial mass litigation in Germany, England and Wales, and the Netherlands. Several European studies have inventoried the legal aspects of national collective redress mechanisms, but they hardly provide an insight into the available funding mechanisms within this context, how they are embedded in the existing legal systems, and their practical operation. This study describes the legal frameworks of three jurisdictions; a positive analysis of both the legal architecture of collective redress mechanism(s) and the aspects that are connected to its funding and actors.<sup>44</sup> The three chapters can be consulted separately, for those interested in entrepreneurial mass litigation within the context of one of the selected jurisdictions. In a way, the country reports furthermore serve as case studies, to collect various rules and features that describe or explain whether the benefits and drawbacks indeed (may) take place. By assembling these rules and features across the three selected jurisdictions, certain general notions, common themes and characteristic features of entrepreneurial mass litigation will be identified, as well as the threats and opportunities that elements of the legal systems may pose to the contribution of entrepreneurial parties to mass litigation.

The choice of the legal regimes to be investigated has been based on the type of differences and similarities the comparison might identify.<sup>45</sup> First, they represent both the common law and civil law tradition. They reflect different views on or the operation of the various legal elements that are connected to entrepreneurial mass litigation, such as costs and funding rules and claim assignment. They represent variations of collective redress mechanisms and different approaches towards collective redress.

From this second part of the study, the review criteria that were established in the theoretical framework will be refined by threats and opportunities that – potentially – affect the beneficial or disadvantageous effects of entrepreneurial mass litigation, which in turn can affect (positively or negatively) the objectives of collective redress mechanisms.

### **1.3 Structure of the book**

After this introductory chapter that has set out the thesis' research theme, design and methodology, Part I of the book establishes the theoretical foundation against which the rules and features and practical operation of entrepreneurial mass litigation will be investigated. Within this part, Chapter 2 describes the policy objectives that underlie the design of collective redress mechanisms in the selected jurisdictions, as well as the European Union's policy on collective redress (sub-question 1). Chapter 3 concentrates on entrepreneurial parties that operate within the field of mass litigation. After a further description of the types of entrepreneurial parties, it explores their associated benefits and risks (sub-question 2). Section 3.6 formulates the first checklist: which benefits and drawbacks can affect, positively or negatively, the objective(s) of collective redress mechanisms?

In Part II, Chapters 4 to 6 further draw out the building blocks, that is, the rules and features that define the operation of entrepreneurial mass litigation in three European legal regimes: Germany (Chapter

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<sup>44</sup> For the selected key issues, see section 3.6.

<sup>45</sup> Cf. Siems 2014, p. 15.

4), England & Wales (Chapter 5), and the Netherlands (Chapter 6). It discusses the legal rules and features that are closely connected with entrepreneurial mass litigation (sub-question 3) by analysing the relevant national rules, regulation and case law.

Part III closes the research. The analysis in Chapter 7 highlights the similarities and differences among the selected jurisdictions and discusses to what extent the rules and features (potentially) amplify or reduce the benefits or drawbacks, and thus qualify as an opportunity or a threat to the functioning of entrepreneurial mass litigation (sub-question 4). Furthermore, it provides a framework for weighing and balancing the benefits and drawbacks of entrepreneurial mass litigation, and therewith aims to answer the main research question: what the relevant conditions are in assessing the likelihood of entrepreneurial parties contributing to the chosen objectives of collective redress.



## **Part I: Normative and Theoretical Framework**



## 2 Collective redress mechanisms and their policy objectives

*‘Dragged out of the litigative attic at irregular intervals to deal with exotic cases of travelling preachers, evicted congregations, recalcitrant unions, and groups of warring creditors, the class suit, as it had come to be called, was clearly good for something, even if no one could quite figure out what.’<sup>1</sup>*

### 2.1 Introduction

Without an initiator that pursues collective redress, the objectives of the mechanism are not achieved. Entrepreneurial parties undertake such action or enable it to be pursued and therewith might contribute to fulfilling these objectives. In order to establish to what extent such parties benefit or hinder the settlement of mass disputes, as a first step it is necessary to understand the underlying policy goals of the various mechanisms. This chapter aims to provide such insight by introducing those mechanisms and highlighting the underlying policy objectives. Specific rules and features of the mechanisms will be discussed in more detail in Chapters 4-6.

The chapter is structured as follows. It starts with a chronological overview of collective redress instruments and their underlying policy objectives in the European Union and the three selected jurisdictions (section 2.2). Given the abundance of debates and studies on collective redress, the overviews present the highlights and main policy choices. To further help identify the objectives, the chapter continues with a synopsis of the literature that has laid the theoretical foundation for collective redress (section 2.3). I will then identify the main objectives of the collective redress mechanisms that are examined (section 2.4). The chapter closes with a summarizing schematic overview of the national mechanisms and their main features and objectives (section 2.5).

### 2.2 The development of collective redress in the EU and the selected jurisdictions

#### 2.2.1 European Union

In the European context, the debate on collective redress stems from discussions on consumer protection in the 1970s and 1980s, which by then was no longer considered an exclusively national issue.<sup>2</sup> For instance, in 1972, the Committee of Ministers adopted a resolution on misleading advertising, in which it noted that public bodies and consumer organizations could engage in adequate, rapid and efficacious repression of misleading advertising in order to protect consumers.<sup>3</sup> In 1975, the first (preliminary) European consumer policy programme of the EEC stated that consumers are entitled to

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<sup>1</sup> Yeazell 1987, p. 224, describing the origins of English and American group litigation. Yeazell traces the roots of the American modern class action back to the late twelfth century in England and Wales, noting that there might be other examples of (predecessors of) group litigation found all over medieval Europe.

<sup>2</sup> For an overview of EU (consumer) collective redress, see also the Commission’s Green Paper on consumer access to justice, COM(93) 576 final, Hodges 2009, Micklitz 2010, Wagner 2011, Hodges 2013, and Wrška 2015.

<sup>3</sup> Council Resolution of 18 February 1972, Resolution (72) 8 (recommendations to member states from the Council of Europe).

proper redress for injury or damage by means of swift, effective and inexpensive procedures.<sup>4</sup> The ensuing debate and studies resulted, inter alia, in the obligation for member states to adopt means to prevent or cease infringements of various consumer laws. Such injunctive action could be brought by qualified organizations with ‘a legitimate interest’ in representing consumers’ collective interests.<sup>5</sup> It was inspired by the German *Unterlassungsklage*, which was presumed to be an effective instrument to bridge the perceived enforcement gap.<sup>6</sup> According to the Commission, the economic viewpoint of compelling wrongdoers to internalize the costs they had created was particularly important in consumer cases, as consumers’ losses often did not justify engaging in costly litigation. The (mere existence of) preventive mechanisms would deter wrongdoers from displaying detrimental behaviour. This would render dispute resolution and compensation redundant.<sup>7</sup>

Over time, however, it appeared that injunctive relief did not suffice in preventing mass infringements. This point of view emerged around 2000, after the Commission’s evaluation of the 1993 Unfair Terms Directive.<sup>8</sup> Member states reported that unfair terms were not swiftly eliminated due to time-consuming litigation, and that enforcement mechanisms to prevent recurrence, such as public fines for not complying with a court order, were not very practicable, because, for instance, the claimant would have to go to court once more. Thus, the difficulties of individual redress – due to high litigation costs and risks, complex and lengthy procedures,<sup>9</sup> and diminishing publicly funded legal aid<sup>10</sup> – and the (perceived)<sup>11</sup> incompleteness of injunctive relief slowly started to spark the debate on *compensatory* collective redress. As part of the policy strategy to promote the retail internal market and consumer and retailer confidence, in 2007, the Commission announced its intention to consider options for compensatory consumer collective redress.<sup>12</sup> As various EU institutions urged the Commission to approach the

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<sup>4</sup> Council of the European Communities, Resolution of 14 April 1975, *OJ C* 92, 25.4.75, and the annexed Preliminary programme, consideration 32. Follow-up policy documents include the Commission’s Supplementary Communication of 7 May 1987 on consumer redress, COM(87) 210 final (see on the role of consumer organizations, p. 3 and 4). See also, from the Council of Europe, the Recommendation on the legal protection of the collective interests of consumers by consumer agencies, adopted on 23 January 1981, Recommendation R(81) 2.

<sup>5</sup> This option was included in the 1984 Directive on misleading advertising (84/450/EEC), the 1993 Directive on Unfair Terms in Consumer Contracts (93/13/EEC), and the 1998 Injunctions Directive (98/27/EC) (later repealed by Directive 2009/22/EC).

<sup>6</sup> Micklitz 2010, p. 7. On the *Unterlassungsklage*, see sections 2.2.2 and 4.5.3.2.

<sup>7</sup> Commission’s Green Paper on consumer access to justice, COM(93) 576 final, p. 7.

<sup>8</sup> Commission’s Report on the implementation of the Unfair Terms Directive, COM(2000) 248 final, p. 22-23, and p. 43 ff, notably graph 7. See, similarly, the Commission’s Report on the application of the Injunctions Directive, COM(2008) 756 final; considerations 25-27 refer to the limited impact of the (cross-border) actions.

<sup>9</sup> See the Special Eurobarometer 195 (October 2004), which also revealed that 67% of European consumers (of 15 member states) would be more willing to defend their rights in court if they could join other consumers complaining about the same issue, p. 36 ff.

<sup>10</sup> Hodges 2013, p. 3.

<sup>11</sup> According to Micklitz there is little evidence available on the effects and effectiveness of the action for an injunction; Micklitz 2010, p. 7.

<sup>12</sup> Commission’s Communication EU Consumer Policy strategy 2007-2013, COM(2007) 99 final, p. 11, with reference to the Commission’s Green Paper on damages actions in competition law, COM(2005) 672 final (on this paper, see also hereafter).

topic with care,<sup>13</sup> the ensuing Green Paper on Consumer Collective Redress first assessed the state of the then available enforcement mechanisms. The Commission concluded that the current European redress and enforcement framework was ‘not satisfactory’.<sup>14</sup> Consequently, a significant proportion of harmed consumers did not obtain redress and compensation, which jeopardized consumer trust. Despite criticism that the studies preceding the Green Paper did not encompass the (effects and effectiveness of the) action for an injunction in its analysis,<sup>15</sup> the Green Paper resulted in a ‘three pillar policy’<sup>16</sup> with regard to consumer protection mechanisms.<sup>17</sup> This policy focuses on a mix of ADR, judicial collective redress and public enforcement. For instance, private compensatory collective redress could complement administrative sanctions against consumer law infringements. Responses to mass claim cases would have to be based on ‘accessible, affordable and effective redress with minimal costs for all involved, providing compensation for legitimate claims, preventing unmeritorious claims and taking into account the legal traditions of the Member States’.<sup>18</sup> At all times, though, all involved institutions stressed that Europe would have to refrain from adopting anything like the US class action with its undesired effects. Illustrative are two quotes from Commissioner Kuneva’s speeches in 2007:

*‘We are certainly not thinking about bringing a US style system of class action to Europe.’<sup>19</sup>*

*‘To those who have come all the way to Lisbon to hear the words “class action”, let me be clear from the start: there will not be any. Not in Europe, not under my watch.’<sup>20</sup>*

Meanwhile, the debate on compensatory collective redress had started to gain ground in the area of competition law as well. Here, the Court of Justice of the European Union stimulated the debate on the effective enforcement of harmonized substantive rules – the current EC Treaty Articles 81 and 82.<sup>21</sup> In an area of law where public enforcement predominated,<sup>22</sup> the ECJ emphasized that compliance

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<sup>13</sup> See the Council’s resolution of 31 May 2007, 2007/C 166/01, consideration 10; the Parliament’s resolution of 20 May 2008, 2007/2189(INI), consideration 40; and the EESC’s Opinion of 14 February 2008, 2008/C 192/01. See also the OECD’s Recommendation of 12 July 2007, C(2007) 74.

<sup>14</sup> Commission’s Green Paper on Consumer Collective Redress, COM(2008) 794 final, no. 17 and 19.

<sup>15</sup> See Micklitz 2010, p. 7, with reference to the 2008 Evaluation by Civic Consulting / Oxford Economics, and the 2008 Study by GHK, Civic Consulting, Van Dijk Management Consultants.

<sup>16</sup> Hodges 2013, p. 4.

<sup>17</sup> See, for instance, DG SANCO’s Consultation paper 2009, and, discussed hereafter, the Commission’s Public Consultation Document of 2011, SEC(2011)173 final.

<sup>18</sup> DG SANCO’s Consultation paper 2009, considerations 3 and 5.

<sup>19</sup> Speech of 24 May 2007 by Commissioner M. Kuneva, *Consumer policy has come of age*, at the BEUC General Assembly in London.

<sup>20</sup> Speech of 10 November 2007 by Commissioner M. Kuneva, *Healthy Markets Need Effective Redress*, at the conference on collective redress for European consumers in Lisbon.

<sup>21</sup> The Van Gend & Loos judgment (ECJ 5 February 1963, case 26/62) has been declared to be the first signal of ‘adding the private pillar’ to complement public enforcement, see Paulis 2007, p. 8-9.

<sup>22</sup> See, for instance, Council Regulation (EC) No. 1/2003, which gave powers to the Commission and national competition authorities to take action upon infringements.

with competition rules should also be ensured by private enforcement before national courts.<sup>23</sup> Therefore, ‘any individual’ should be able to claim damages for harm suffered, otherwise ‘the full effectiveness of Article 81 EC (...) would be put at risk’.<sup>24</sup> National (procedural) laws would have to ensure that individuals could effectively exercise their European rights by bringing actions for damages. A lack of such laws would jeopardize the principles of effectiveness and equivalence.<sup>25</sup>

The Ashurst study, commissioned by DG Competition, gave another impetus to the debate on the private enforcement of competition law.<sup>26</sup> Whereas the 1966 Batiffol study on the redress of damage caused by infringements of competition law had concluded that the (then) member states were sufficiently capable of providing remedies and procedures for competition law infringements,<sup>27</sup> in 2004, the evidence seemed to point in the opposite direction. Although the Ashurst study did notice a rise in (representative) injunctive actions in some jurisdictions, one of the main findings was the ‘total underdevelopment’ of damages claims at national courts.<sup>28</sup> Many obstacles to bringing such claims were identified, both substantive (such as the calculation of damages) and procedural (such as high litigation costs). In order to encourage private enforcement, the authors suggested introducing other types of actions, such as (US-style) class actions or claims by consumer organizations or public representatives.<sup>29</sup>

Many have criticised the Ashurst study, casting doubt on the finding that a low number of damage cases are adjudicated in competition law.<sup>30</sup> Their main objection is that the study did not employ an adequate method because, for instance, summary proceedings, arbitration and extrajudicial settlements were not included. Later studies seemingly reported more damages claims.<sup>31</sup> Nevertheless, the Commission’s Green Paper (2005) that ensued the Ashurst study did not question the need for (more

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<sup>23</sup> ECJ 20 September 2001, ECLI:EU:C:2001:465 (*Courage v. Crehan*) and ECJ 13 July 2006, ECLI:EU:C:2006:461 (*Manfredi*).

<sup>24</sup> *Courage v. Crehan*, consideration 26; *Manfredi*, consideration 60.

<sup>25</sup> *Manfredi*, consideration 62, referring to *Courage v. Crehan*. Although member states enjoy procedural autonomy when it comes to the enforcement of substantive laws, they have to abide by these principles. Member states cannot render the enforcement of European law ‘virtually impossible’ or ‘excessively difficult’; ECJ 16 December 1976, ECLI:EU:C:1976:188 (*Rewe*).

<sup>26</sup> Waelbroeck, Slater & Even-Shoshan 2004. The study on damages actions for a breach of competition law in the EU identified and analysed potential obstacles to private enforcement and suggested how to better facilitate damages actions.

<sup>27</sup> Deringer Report 1961 (for the EP) and Batiffol Study (for the EC), as summarized by Cumming & Freudenthal 2010, p. 5.

<sup>28</sup> Waelbroeck, Slater & Even-Shoshan 2004, p. 2.

<sup>29</sup> Waelbroeck, Slater & Even-Shoshan 2004, p. 9-10.

<sup>30</sup> For instance, Van den Bergh 2006; Van Lierop & Pijnacker Hordijk 2007; Zippro 2009, p. 169; Hodges 2013; Hodges 2014.

<sup>31</sup> Hodges 2013.

efficient) private enforcement of competition law.<sup>32</sup> The Commission considered it desirable that victims of competition law violations are able to recover damages,<sup>33</sup> and suggested facilitating compensatory collective actions as a possibility to ‘enable consumers to be viable litigants’.<sup>34</sup> This would contribute to the overarching aims of compensation and deterrence. In addition, in comparison to individual litigation, collective redress would have the efficiency advantage of saving time and money through the consolidation of large numbers of claims. Moreover, it would diminish the free rider problem,<sup>35</sup> and create equality of arms between ‘otherwise diffuse claimants’ and ‘well-organised and potentially resource-rich defendants’.<sup>36</sup> The subsequent White Paper (2008) expanded on these proposals.<sup>37</sup> The Commission reiterated that measures to facilitate damages actions were essential and that there was a ‘clear need for mechanisms allowing aggregation of individual claims of victims of antitrust infringements’.<sup>38</sup> Otherwise, harmed parties would be left uncompensated, and harmed and complying parties rather than the wrongdoer would have to absorb the losses. It suggested introducing two complementary collective redress mechanisms: representative actions by qualified entities and opt-in collective actions by victims of anti-competitive behaviour. These mechanisms would enhance access to justice and contribute to an efficient administration of justice, as national courts would not have to deal with a multitude of (scattered low value) individual claims.<sup>39</sup> Moreover, it would reduce the inequality between victims and infringers in settlement discussions.<sup>40</sup> Contrary to the Green Paper, the Commission emphasized that – full – compensation was the primary guiding principle. The improvement of ‘compensatory justice’ would then ‘inherently’ benefit the objectives of deterrence and compliance.<sup>41</sup> Consequential to this choice, actions for damages should not lead to overcompensation (punitive damages); damages should correspond with the harm suffered.<sup>42</sup>

The Green and White Paper provided the basis for the 2009 draft Directive on collective redress in competition law cases. However, the Commission withdrew the draft due to political reasons.<sup>43</sup> The debate on collective redress did however continue on a new level: around 2010, the European Commission abandoned the sectoral approach. The three Commissioners who now joined forces agreed

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<sup>32</sup> Commission’s Green Paper, COM(2005) 672 final.

<sup>33</sup> See the accompanying Commission Staff Working Paper, SEC(2005) 1732, no. 4.

<sup>34</sup> Commission Staff Working Paper 2005, no. 188. See also the Commission’s Green Paper, p. 3-4 and p. 9, options 25 and 26.

<sup>35</sup> Claimants that await and benefit from the action of others before deciding to bring their own case, see also section 2.3.

<sup>36</sup> Commission Staff Working Paper 2005, no. 193.

<sup>37</sup> Commission’s White Paper, COM(2008) 165 final, which was accompanied by the Commission Staff Working Paper, SEC(2008) 404, and an Impact Assessment, SEC(2008)405 and its Executive Summary, SEC(2008) 406.

<sup>38</sup> White Paper 2008, p. 4. See also the Impact Assessment, sections 2 and 5.2.5 and the Commission Staff Working Paper 2008, no. 39 ff.

<sup>39</sup> Commission Staff Working Paper 2008, no. 39, 40 and 43.

<sup>40</sup> Commission Staff Working Paper 2008, no. 41.

<sup>41</sup> White Paper 2008, p. 3, and Commission Staff Working Paper 2008, no. 14 and 15. See on this change Wagner 2011, p. 56.

<sup>42</sup> Commission Staff Working Paper 2008, no. 59.

<sup>43</sup> Micklitz 2010, p. 37, Hodges 2013, p. 6.

on the need for a horizontal and coherent European approach to collective redress.<sup>44</sup> This new approach led to the 2011 public consultation, which aimed to identify common legal principles on collective redress that should guide any possible initiative for EU legislation.<sup>45</sup> This resulted in the non-binding Recommendation and Communication of June 2013.<sup>46</sup> The (political) support for a binding instrument was insufficient.<sup>47</sup> The Recommendation sets out basic principles that member states need to consider with regard to collective redress mechanisms, taking account of their own legal tradition. The accompanying Communication amplifies the Commission's viewpoint and choices. Collective redress should pursue a threefold purpose: to facilitate access to justice, stop illegal practices and enable aggrieved parties to obtain compensation in mass harm situations caused by violations of rights granted under Union law.<sup>48</sup> Although private mechanisms may complement public enforcement, there is no need for EU initiatives on collective redress to go beyond the goal of compensation, such as pursuing public norms and controlling behaviour (punishment/deterrence). Deterrence is considered a possible side effect, but as a goal it is better achieved by public enforcement.<sup>49</sup> Consequently, punitive damages are prohibited, also because such remedy is not part of the European legal tradition and carries the risk of abusive litigation.<sup>50</sup> On an operational level, Recommendation 2 states that collective redress mechanisms should be fair, equitable, timely, and not prohibitively expensive. This is based on the consensus between stakeholders that any mechanism i) should be capable of effectively resolving a large number of individual claims for compensation of damage, thereby promoting procedural economy, ii) should be capable of delivering legally certain and fair outcomes within a reasonable timeframe, while respecting the rights of all parties involved, and iii) should provide for robust safeguards against abusive litigation and avoid any economic incentives to bring speculative claims.<sup>51</sup>

On the same date as when the Recommendation and Communication were issued, the Commission issued its proposal for a Directive on damages actions for breaches of EU Competition law,<sup>52</sup> which was signed into law in 2014.<sup>53</sup> The Directive does not contain provisions on collective redress. It instructs member states to ensure that harmed parties have the opportunity to obtain compensation for their loss in the national courts, but focuses on individual actions: it explicitly states that it does not require member states to introduce collective redress mechanisms for the enforcement of European competition law.<sup>54</sup>

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<sup>44</sup> Joint Information Note of 5 October 2010 by Commissioner Reding (Justice, Fundamental Rights and Citizenship), Almunia (Competition), and Dalli (Health and Consumer Policy), SEC(2010) 1192.

<sup>45</sup> Commission's Public Consultation, SEC(2011)173 final, p. 5. Adopted by the European Parliament in its resolution of 2 February 2012, 2011/2089(INI).

<sup>46</sup> Recommendation 2013/396/EU, and Communication COM(2013) 401 final.

<sup>47</sup> Rodger 2015.

<sup>48</sup> Recommendation, recital 1, Recommendation 1; see also Communication p. 2 and 3.

<sup>49</sup> Communication, p. 10, 15.

<sup>50</sup> Recommendation 31, see also Communication, p. 9-10.

<sup>51</sup> Communication, p. 6, 9 and 10.

<sup>52</sup> Proposal for the Antitrust Damages Directive, COM(2013) 404 final; accompanied by the Commission Staff Working Document 2013, SWD(2013) 203 final.

<sup>53</sup> Antitrust Damages Directive 2014/104/EU of 26 November 2014.

<sup>54</sup> Recital 13 of the Antitrust Damages Directive.



In the area of consumer law, in May 2017, the Commission published a so-called Fitness Check of consumer rights and advertising, a check which included the Injunctions Directive.<sup>55</sup> The evaluation, inter alia, emphasized the importance of the latter directive, but also revealed its shortcomings. Injunction procedures remain underused, mainly due to the costs, length and complexity of the proceedings, the limited effect of rulings on, inter alia, individual consumer redress, and the difficulty of enforcing such rulings.<sup>56</sup> Within the context of this research, an important finding is that '[c]lose to half of the responding qualified entities indicated that they did not initiate any injunction actions since June 2011, often because of insufficient financing.'<sup>57</sup> Furthermore, member states identify the financial risk related to injunctions as the main obstacle to its use.<sup>58</sup> These shortcomings limit the injunction procedure's effectiveness in terms of reducing consumer detriment as well as its preventive, deterrent effect. The Commission therefore concluded that the procedure could be further harmonized in order to improve its use and effectiveness.<sup>59</sup> An evaluation study led by the Max Planck Institute Luxembourg, which was issued around the same time (in June 2017), advises to do so by means of targeted measures. More specifically, it recommends clarifying and strengthening the role of consumer bodies and harmonising the binding effect of the decision in collective proceedings, including injunctions.<sup>60</sup> The Inception Impact Assessment on the revision of the Injunctions Directive, led by DG JUST, subsequently listed a number of (non-)legislative options, including a targeted revision of the directive that also allows qualified entities to ensure collective redress for consumers.<sup>61</sup>

Parallel to the developments in the area of competition and consumer law, in January 2018, the Commission issued its report on member states' practical implementation of the 2014 Recommendation and the application of its principles.<sup>62</sup> It concluded that the Recommendation has contributed to fruitful discussions and a reflection on collective redress across the EU, yet its impact by way of national legislation remains rather limited and unevenly distributed. Collective redress is available and/or of relevance mostly in the area of consumer protection.<sup>63</sup> As a next step, the Commission intends to further promote the Recommendation's principles and to carry out further analysis on aspects of collective redress such as litigation funding. The topic of the potential contribution of commercial parties such as third-party funders is still approached with caution, given their potential to create unnecessary incentives to litigate.<sup>64</sup> The Commission aims to follow up the assessment within the framework of the

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<sup>55</sup> European Commission, *Commission Staff Working Document. Report of the Fitness Check on various EU consumer law*, 23 May 2017, SWD(2017) 209 final. The evaluation was announced as part of the 2015 Commission Work Programme; see European Commission, *Annex 3 to the Commission Work Programme 2015 A New Start*, 16 December 2014, COM(2014) 910 final.

<sup>56</sup> *Fitness Check on various EU consumer law*, SWD(2017) 209 final, p. 31 and p. 101 ff.

<sup>57</sup> *Fitness Check on various EU consumer law*, SWD(2017) 209 final, p. 103; the findings are based on a survey.

<sup>58</sup> *Fitness Check on various EU consumer law*, SWD(2017) 209 final, p. 103; the findings are based on the online public questionnaire.

<sup>59</sup> *Fitness Check on various EU consumer law*, SWD(2017) 209 final, p. 31 and 105.

<sup>60</sup> Hess 2017, Chapter 4 (by S. Voet) and p. 29 and 33.

<sup>61</sup> Directorate-General for Justice and Consumers, *The revision of Directive 2009/22/EC on injunctions for the protection of consumers' interests*, 31 October 2017, Ares(2017)5324969.

<sup>62</sup> Commission's Report on the implementation of the Recommendation, COM(2018) 40 final.

<sup>63</sup> Commission's Report on the implementation of the Recommendation, COM(2018) 40 final, p. 4.

<sup>64</sup> Commission's Report on the implementation of the Recommendation, COM(2018) 40 final, p. 10 and 16.

New Deal for Consumers, and will focus particularly on strengthening the redress and enforcement aspects of the Injunctions Directive.<sup>65</sup>

In April 2018, this ‘New Deal for Consumers’ was issued, including a proposal for a directive on representative actions, and a proposal to amend four EU consumer law directives.<sup>66</sup> The proposal on representative actions aims to modernize and replace the Injunctions Directive, as to ‘improve the effectiveness of the injunction procedure and contribute to the elimination of the consequences of the infringements of Union law which affect the collective interests of consumers.’<sup>67</sup>

To conclude, despite decades of debate, the European Union’s policy on collective redress is of a circumspect nature. To define a set of common principles seems to have been a challenging task, both from a political and legal perspective. As a result, the Recommendation’s principles were non-binding, open to interpretation, and contain disclaimers such as ‘taking account of the different legal traditions of the member states’. The Commission’s horizontal approach towards collective redress now seems to have been abandoned with the proposed directive and the renewed focus on injunctions. Again, it focuses on consumer law specifically, in order to strengthen consumer trust – probably incited by mass harm cases such as the breast implant scandal, ‘Dieselgate’ and massive flight cancellations.<sup>68</sup> It remains to be seen to what extent further measures are feasible at the European Union level, if only due to the intense lobbying of various stakeholders and the diversity of the national procedural laws of the member states.

### 2.2.2 Germany

In Germany, individual action has long been a cornerstone of private law enforcement.<sup>69</sup> Gradually and cautiously, the notion has expanded that private parties can pursue collective interests as well. Nowadays, Germany has the following types of sectoral collective redress mechanisms, spread out in various laws. With regard to consumer and competition law, for decades, Germany has focused on injunctive relief (*Unterlassungsklage*) by particular non-profit interest groups (e.g. *Verbände, Verbandsklagen*). Such organizations may also skim-off ill-gotten gains from businesses that have violated competition rules (*Gewinnabschöpfungsklage*), or bring bundled assigned claims after an infringement of consumer law (*Einziehungsklage*). With the Capital Investors’ Model Proceeding Act (KapMuG),

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<sup>65</sup> Commission’s Report on the implementation of the Recommendation, COM(2018) 40 final, p. 20-21.

<sup>66</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC*, 11 April 2018, COM(2018) 184 final and European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules*, 11 April 2018, COM(2018) 185 final. The proposals are accompanied by a Communication; European Commission, *A New Deal for Consumers*, 11 April 2018, COM(2018) 183 final.

<sup>67</sup> Proposal for a Directive on representative actions, Explanatory Memorandum, p. 1.

<sup>68</sup> Commission Work Programme 2018, COM(2017)650 final, p. 7.

<sup>69</sup> See also section 4.1.

harmed investors can obtain compensatory collective redress in the area of securities law. The additional instruments that have been employed in practice in order to obtain collective redress – bundling assigned claims by a special purpose vehicle – will be discussed in sections 4.4.4 and 4.5.5.

An important instrument of collective redress is the long-standing representative action for injunctive relief by interest groups.<sup>70</sup> This *Unterlassungsklage* allows certain organizations to act on behalf of those who are affected by certain infringements. The representative action was first introduced in 1896 in the Act against Unfair Competition (UWG).<sup>71</sup> Various representative organizations as well as individual competitors were given the right to bring an injunction in cases of misleading advertising to protect the interests of competitors.<sup>72</sup> Later, the courts acknowledged that such actions could also protect consumers.<sup>73</sup> In this respect, in 1965, the German legislator extended the right to seek injunctive relief to consumer organizations (*Verbraucherverbände*),<sup>74</sup> which, as of 2002, fall under the category of qualified organizations (*Qualifizierte Einrichtungen*).<sup>75</sup> Nowadays, the protection of competitors, consumers, as well as the public (*Schutzzwecktrias*) is explicitly mentioned as the UWG's goal.<sup>76</sup> Nevertheless, the legislator has explicitly excluded individual consumers from bringing a claim for injunctive relief. This would question the high protection level of the UWG and could incite (too) many individual claims, which, in turn, could excessively burden companies and negatively affect the investment climate.<sup>77</sup>

In 2005, the action for injunctive relief was added to the Act against restraints of competition (GWB). As a result, business organizations and qualified organizations were now allowed to have standing to bring a claim to cease and desist anti-competitive behaviour (*Beseitigung und Unterlassung*), next to individual competitors and other market participants.<sup>78</sup>

In consumer law, the milestones are the 1976 Act on General Terms and Conditions (AGBG) and the 2002 Act on Injunctive Relief (UKlaG). The former proved an influential source for the Injunctions Directive (1998/27/EC),<sup>79</sup> which, in turn, was implemented in the UKlaG – with a broader scope: the UKlaG also applies to domestic cases. Since the UKlaG, injunctions against any infringement of consumer law can be brought by business organizations, chambers of commerce, and qualified organizations.<sup>80</sup>

Over the years, the *Unterlassungsklage* by *Verbände* has found its way into other areas of law as well, such as human rights and administrative law.<sup>81</sup>

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<sup>70</sup> Micklitz & Stadler 2005, p. 19.

<sup>71</sup> Schaumburg 2006, p. 24, Baetge 2009, p. 126.

<sup>72</sup> For the types of organizations and the designation and qualification thereof, see section 4.5.3.1.

<sup>73</sup> Neuberger 2006, p. 7, who refers to German case law in the 1930s. See also De Vrey 2006, p. 158.

<sup>74</sup> UWG 21. Juli 1965, BGBl. I 265, § 13 UWG (old). See Neuberger 2006, p. 8 and Baetge 2009, p. 126. See for an overview of all types of *Verbände*, Meller-Hannich & Höland 2010, p. 36. See also Dürr-Auster 2017.

<sup>75</sup> With the introduction of the UKlaG, see hereafter. Qualified organizations are those that have been authorized by a public authority, the Federal Office of Justice (*Bundesamt für Justiz*). See section 4.5.3.1.

<sup>76</sup> Deutscher Bundestag, *Entwurf UWG*, Drucksache 15/1487, 22.08.2003, p. 5 and 15.

<sup>77</sup> Deutscher Bundestag, *Entwurf UWG*, Drucksache 15/1487, 22.08.2003, p. 22.

<sup>78</sup> § 33 GWB.

<sup>79</sup> See section 2.2. The 1998 Injunctions Directive was repealed by Directive 2009/22/EC.

<sup>80</sup> § 1, 2 and 4 UKlaG.

<sup>81</sup> For instance, the Law on the Equal Treatment of Disabled Persons (*Behindertengleichstellungsgesetz*), § 12 and 13.

The German legislator perceives injunctive relief by interest groups as an instrument to ensure enforcement and to obtain the ‘maximum effectiveness’ of legal norms.<sup>82</sup> The norms protected by the various *Unterlassungsklage* address diffuse interests and do not necessarily provide for individual claims.<sup>83</sup> Thus, these entities fulfil a public task if traditional instruments of control and law enforcement fail; they aim to restore the functioning of the market after, for instance, unfair practices.<sup>84</sup> The interest groups might not have an own interest or right but are statutorily allowed to act on behalf of aggrieved parties, who then might individually profit from the judgment’s reflex and precedent (*Breitenwirkung*).<sup>85</sup> For UKlaG cases, the judgment has a binding effect against the same defendant(s) in similar claims.<sup>86</sup>

In addition to injunctive relief, certain organizations can bring a claim to skim off ill-gotten gains that have been obtained by competition law infringers (*Gewinnabschöpfungsklage*). This mechanism originated from a 1977 study by the Max Planck Institute, which reported a competition law enforcement deficit.<sup>87</sup> The following decades marked the exploration of various options to fill this gap, including by way of collective redress.<sup>88</sup> The government deemed a reform of competition law to be necessary, particularly in cases in which consumers were not likely to bring actions for damages given the extent of the damage.<sup>89</sup> The protection of consumers’ and public interest deserved a more prominent display.<sup>90</sup> In 2004 (UWG) and 2005 (GWB), German competition law was reformed. To ensure that unfair competition would not pay off, designated entities were granted the right to bring a claim to skim off illegally obtained profits.<sup>91</sup> The regulation does not allow competitors to bring such a claim, as disgorgement is considered to be an administrative sanction, not a remedy. Nevertheless, the action has a civil rather than criminal or punitive character, as the sanction ‘merely’ provides for the skimming off of illegally obtained profits.<sup>92</sup> The proceeds of the action benefit the public purse (the federal treasury).

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<sup>82</sup> Deutscher Bundestag, *AGB Gesetz*, Drucksache 7/3919, 06.08.75, p. 54-55.

<sup>83</sup> Diffuse interests are collective or fragmented interests such as consumer and environmental protection. Individuals either do not have the right to address infringements of such interests, or the right concerns a negative-value claim. See Cappelletti & Garth 1978, p. 18, and section 2.3.

<sup>84</sup> Micklitz 2012, p. 80, Koller 2014, p. 42, with further references, and Geiger 2015, p. 29, with further references.

<sup>85</sup> Tamm 2009, and Stadler & Klopfer 2012.

<sup>86</sup> § 11 UKlaG.

<sup>87</sup> Neuberger 2006, p. 8, with reference to the study by Von Falckenstein, *Die Bekämpfung unlauterer Geschäftspraktiken durch Verbraucherverbände*, Cologne 1977.

<sup>88</sup> Notably, the studies and discussion papers of Basedow e.a. 1999, Köhler, Bornkamm & Henning-Bodewig 2002 and Micklitz & Stadler 2003, summarized by Neuberger 2006, p. 12-19.

<sup>89</sup> Cases that concern *Bagatellschaden* cannot lead to claims for injunctive relief pursuant to § 3 UWG; see also Deutscher Bundestag, *Entwurf UWG*, Drucksache 15/1487, 22.08.2003, p. 17. Amounts are not mentioned, but Micklitz & Stadler suggest a limit of € 25-75 per person; Micklitz & Stadler 2003.

<sup>90</sup> Deutscher Bundestag, *Entwurf UWG*, Drucksache 15/1487, 22.08.2003, and Deutscher Bundestag, *Entwurf Änderung GWB*, Drucksache 15/3640, 12.08.2004, p. 55.

<sup>91</sup> § 10 UWG and §34 and §34a GWB. For the types of organizations and the designation and qualification thereof, see section 4.5.3.1.

<sup>92</sup> Meller-Hannich & Höland 2010, p. 26.

The *Gewinnabschöpfungsklage* supplemented the traditional *Verbandsklage* to deter potential wrongdoers.<sup>93</sup> The aim of the procedure is to improve the enforcement of competition law in cases of trivial and small damage (*Bagatell- und Streuschäden*). In such cases, an enforcement gap exists due to rational apathy: a large number of persons have been harmed, which has caused a substantial aggregate loss, but individuals will not pursue their claim as their own damage is relatively limited.<sup>94</sup> Furthermore, competitors might not have the right to do so.<sup>95</sup> The action to skim off ill-gotten gains is intended as an alternative; a last resort if claims for individual damages or fines have not yet absorbed the illicit proceeds. It is an administrative sanction, to be applied in only 'hard-core' cases of intentional infringement that concern a large number of persons.<sup>96</sup> Hence, it does not aim to compensate individual loss, but has a general and singular preventive function, justified by the fact that 'liability law does not get to grips with individual claims for such minor damages.'<sup>97</sup>

After an infringement of consumer law, *compensatory* collective redress can be obtained through the bundling of assigned claims from consumers.<sup>98</sup> The claims are assigned to a qualified consumer organization, which then brings the action in its own name for collection purposes (*Einziehungsklage*). This possibility has existed since 2002, in order to stimulate the enforcement of negative-value claims.<sup>99</sup>

The last addition to traditional two-party litigation is the Capital Investors' Model Proceeding Act (KapMuG). This mechanism has been designed – also – to obtain compensation, although the actual achievement of such redress entails individual assessment. In other respects, too, the KapMuG clings on to individual protection.<sup>100</sup> In 2005, the KapMuG entered into effect, following the Deutsche Telekom securities fraud case in which thousands of individual shareholders brought a claim at the Frankfurt court of first instance.<sup>101</sup> As a solution to concerns that the court would be congested for many years with these complex cases, KapMuG was put in place. In short, the procedure entails three steps.<sup>102</sup> First, following an application to start the model proceeding, the court of first instance decides whether the answer to the central question(s) in that particular case is relevant to many other cases. If so, and if within a period of six months at least nine other applications have been filed to conduct a model proceeding, the cases will be referred to the court of appeal. The court of appeal will

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<sup>93</sup> Deutscher Bundestag, *Entwurf UWG*, Drucksache 15/1487, 22.08.2003, for instance, p. 24, and Deutscher Bundestag, *Entwurf Änderung GWB*, Drucksache 15/3640, 12.08.2004, p. 21.

<sup>94</sup> See also section 2.3.

<sup>95</sup> Deutscher Bundestag, *Entwurf UWG*, Drucksache 15/1487, 22.08.2003, p. 23.

<sup>96</sup> Deutscher Bundestag, *Entwurf Änderung GWB*, Drucksache 15/3640, 12.08.2004, p. 55.

<sup>97</sup> Micklitz 2007, p. 14, Verbraucherzentrale Bundesverband 2011, p. 17.

<sup>98</sup> Meller-Hannich & Höland 2010, p. 18. If it is used, usually it is deployed as a test case. See Verbraucherzentrale Bundesverband 2011, p. 15, and Wendt 2011, p. 620. See also section 4.5.5.1.

<sup>99</sup> See § 8(1)(4) RDG and § 79(2)(3) ZPO. Before 2008, it was laid down in the Legal Counsel Act (*Rechtsberatungsgesetz*, RBerG).

<sup>100</sup> See hereafter, and section 4.5.4.

<sup>101</sup> According to Stadler, it concerned more than 16,000 small investors, see Stadler 2010, p. 86.

<sup>102</sup> Deutscher Bundestag, *Entwurf Einführung KapMuG*, Drucksache 15/5091, 14.03.2005, p. 1.

select a test case,<sup>103</sup> and address the issue(s) as formulated by the court of first instance. The subsequent model case judgment (*Musterentscheid*) only concerns this test case, but binds all claimants. Subsequently, the court(s) of first instance will assess the remaining cases accordingly, but individual issues such as reliance or causation still need to be addressed.<sup>104</sup> Originally, the duration of the KapMuG was limited to 2012, but in 2012, the ‘experiment’ was prolonged to 2020.<sup>105</sup>

The KapMuG aims to overcome not only procedural inefficiencies, but an enforcement deficit as well. According to the German legislator, the existing rules of civil procedure to join claims were inadequate in cases of small and scattered damage. Here too, as a consequence of rational apathy problems, wrongdoers were not – sufficiently – being held liable, thus liability rules would lose their function of guidance or deterrence.<sup>106</sup> The improvement of effective legal protection against large corporations would ensure an efficient and trustworthy capital market. Feess and Halfmeier note that the drastic decline in investments (a backlash in shareholder confidence) may also have been a relevant incentive for legislative activity.<sup>107</sup> The German government thus listed the four following objectives.<sup>108</sup> First, the KapMuG has a regulatory objective (*Ordnungspolitisch*): it aims to strengthen the functioning of liability rules; issuers are thereby reminded that they should follow the rules. The KapMuG emphasizes the complementary role of state-controlled supervision; where individual damage is suffered, harmed investors are given an essential role in enforcing market regulation. The second consideration concerns effective legal protection. As litigation through KapMuG is (cost-)effective, it will incentivize individuals to bring a claim, which restores the regulatory function of liability rules (*Lenkungs- und Steuerungsfunktion*). The third objective is to ease the judiciary’s burden and mitigate the risk of diverging outcomes. Moreover, the KapMuG saves resources and increases legal efficiency as, for instance, it requires only one legal expert. Fourth, the introduction of the KapMuG modernises the German procedure, which improves Germany’s position in the competitive European legal markets and puts a halt to forum shopping by German investors. This also prevents the extraterritorial effect of foreign legislation.

The aforementioned reforms were implemented in an otherwise individually-oriented legal landscape. In its response to the European public consultation on collective redress in 2011, the German government expressed this focus on individual action and its hesitance towards a European instrument for collective redress.<sup>109</sup> It recognized the importance of effective enforcement in order to achieve the

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<sup>103</sup> According to the criteria of § 9(2) KapMuG, see section 4.5.4.

<sup>104</sup> Haar 2014, p. 100.

<sup>105</sup> Deutscher Bundestag, *Beschlussempfehlung und Bericht zu dem Entwurf Einführung KapMuG*, Drucksache 15/5695, 15.06.2005, p. 22, and Deutscher Bundestag, *Entwurf Reform KapMuG*, Drucksache 17/8799, 29.02.2012.

<sup>106</sup> Deutscher Bundestag, *Entwurf Einführung KapMuG*, Drucksache 15/5091, 14.03.2005, p. 13.

<sup>107</sup> Feess & Halfmeier 2014.

<sup>108</sup> Deutscher Bundestag, *Entwurf Einführung KapMuG*, Drucksache 15/5091, 14.03.2005, p. 16-17.

<sup>109</sup> Deutscher Bundestag, *Stellungnahme im Rahmen der Konsultation Kollektiver Rechtsschutz*, Drucksache 17/5956, 25.05.2011, p. 1-2 (issued by the Parliament’s legal affairs committee). For the various – predominantly rejective – responses of German industry, see the overview provided by Hess e.a. 2011, and those mentioned in Stadler 2013, p. 282.

proper functioning of the internal market, but it emphasized the lack of evidence that national mechanisms fail to do so. According to the government, German consumers can access justice at a calculable litigation risk, moderate costs, with possibilities for legal aid funding and insurance, and the duration of litigation is short. The number of times claimants fail to bring a claim is unknown, and they have procedural mechanisms such as joinder and a test case at their disposal, which consumers seem very well capable of coordinating in the age of the internet. Furthermore, with the *Gewinnabschopfungsklage*, designated entities can correct competition law infringements in cases of scattered damage, and improvements are currently being investigated. Finally, according to the government, the KapMuG provides a more effective and quick instrument to obtain a judgment in securities cases, and might be extended to other areas of law.<sup>110</sup> In its response, the government is also adamant about private enforcement by individuals or groups that exceeds their own interests: they can only do so when they are designated to execute such a public function.<sup>111</sup> In the area of competition law, one can even speak of a climate of public enforcement and a subordinate role for compensatory redress; without public supervision and enforcement, follow-on actions are not possible. The government rejects the public enforcement of private compensatory redress, as it would go against party autonomy.<sup>112</sup> Consumer law enforcement, finally, is traditionally and fundamentally accepted to be the prerogative of privately organized consumer organizations.

Despite the declared efficiency and effectiveness of the German legal regime, in 2014, the German Green Party submitted a legislative proposal for a group action (*Gruppenverfahren*).<sup>113</sup> The main idea was that mass disputes demand that the exclusive focus on individual autonomy should be abandoned. Various substantive laws do not solely aim at private interests, but have a social or public function as well, and rational apathy creates an enforcement deficit that should not be ignored, according to the submitters of the proposal.<sup>114</sup> The mechanism has three objectives.<sup>115</sup> First, to generalize the KapMuG for other areas and to integrate it into civil procedure, and therewith create a more systematic collective redress regime. Second, it aims to lower the threshold for obtaining collective redress and, by doing so, strengthen enforcement. Third, it accomplishes an adequate dispute resolution mechanism: the settlement of common questions transcends the individual approach (*überindividuelle Konfliktlösung*) which will render individual litigation superfluous. However, in October 2015, the German Parliament rejected the proposal.<sup>116</sup> Notably, the limited option to comply with the fundamental right to be heard proved to be an insurmountable obstacle.<sup>117</sup> Although some parties stated that the evaluation of the KapMuG in 2020 should be awaited, the government announced a further deliberation

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<sup>110</sup> Deutscher Bundestag, *Stellungnahme im Rahmen der Konsultation Kollektiver Rechtsschutz*, Drucksache 17/5956, 25.05.2011, p. 4.

<sup>111</sup> Deutscher Bundestag, *Stellungnahme im Rahmen der Konsultation Kollektiver Rechtsschutz*, Drucksache 17/5956, 25.05.2011, p. 5.

<sup>112</sup> Deutscher Bundestag, *Stellungnahme im Rahmen der Konsultation Kollektiver Rechtsschutz*, Drucksache 17/5956, 25.05.2011, p. 6.

<sup>113</sup> Deutscher Bundestag, *Entwurf Gruppenverfahren*, Drucksache 18/1464

<sup>114</sup> Deutscher Bundestag, *Entwurf Gruppenverfahren*, Drucksache 18/1464, p. 1, 13-14.

<sup>115</sup> Deutscher Bundestag, *Entwurf Gruppenverfahren*, Drucksache 18/1464, p. 16.

<sup>116</sup> Deutscher Bundestag, *Beschlussempfehlung Entwurf Gruppenverfahren*, Drucksache 18/64422.

<sup>117</sup> Deutscher Bundestag, *Beschlussempfehlung Entwurf Gruppenverfahren*, Drucksache 18/64422, p. 4.

on a legislative proposal for a *Musterfeststellungsverfahren*. It announced that such a proposal should be expected in 2016, but it did not arrive, and some feared that further proposals for reform would disappear into a *Schublade*.

At least that was the situation towards the end of 2016. By then, however, the Volkswagen scandal had reignited the debate on collective redress.<sup>118</sup> Indeed, the German Ministry of Justice and Consumer Protection stepped up to the mark. That is, in December 2016, it issued a *Referentenentwurf*, which the government discussed internally but rejected in early 2017.<sup>119</sup> Nevertheless, it was followed by a public *Diskussionsentwurf* in July 2017. This draft legislative proposal introduces a model proceeding (*Musterfeststellungsklage*).<sup>120</sup> To a certain extent, the design is based on KapMuG and the Dutch WCAM.<sup>121</sup> In order to avoid a claim culture, the draft only allows 'UKlaG entities' (business organizations, chambers of commerce, and qualified consumer organizations)<sup>122</sup> to bring such proceedings.<sup>123</sup> They need to do so on behalf of at least 10 consumers or SMEs. They can only claim for *declaratory* relief. Claims for damages still need to be pursued individually, unless a model proceeding results in a court-approved and binding collective settlement.<sup>124</sup> Declaratory relief will be provided by addressing a model case, just like a KapMuG proceeding does. The answer to the common question(s) needs to be relevant for the resolution of 10, 50 or 100 consumers or SMEs with a factually or legally similar dispute.<sup>125</sup> The *Musterfeststellungsklage* is an opt-in mechanism. Consumers and SMEs can register their claim for a small court fee (€ 10), and therewith suspend the limitation period of their individual claim.<sup>126</sup> The action turns into an opt-out mechanism if it results in a court-approved collective settlement. In that case, the settlement is declared binding and individuals need to opt out within a month after the approval has been published in the claims register. Much like a KapMuG settlement, it is invalid if 30% or more of the registered class members opts out.<sup>127</sup> The academic responses to the (earlier) draft are critical.<sup>128</sup> The main critique is the mechanism's expected lack of effectiveness, in particular for negative-value claims, as it still requires individual action in order to obtain damages. It remains to be seen to what extent the actual proposal will deviate from the draft. The new coalition has announced that it will soon bring the legislative proposal before Parliament, and that the act will go into effect before November 2018.<sup>129</sup>

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<sup>118</sup> See also section 3.3.

<sup>119</sup> Stadler 2018, p. 83.

<sup>120</sup> Bundesministeriums der Justiz und für Verbraucherschutz, *Diskussionsentwurf. Entwurf eines Gesetzes zur Einführung einer Musterfeststellungsklage*, 31 July 2017.

<sup>121</sup> Van Boom & Weber 2017, under section 2.2.

<sup>122</sup> § 1, 2 and 4 UKlaG. For the types of organizations and the designation and qualification thereof, see section 4.5.3.1.

<sup>123</sup> § 607 ZPO (as drafted).

<sup>124</sup> § 612 ZPO (as drafted).

<sup>125</sup> The draft leaves the number open for discussion; the new coalition mentions the number 50. See § 606 ZPO (as drafted), *Diskussionsentwurf*, p. 15, and *Koalitionsvertrag zwischen CDU, CSU und SPD*, 7 February 2018, p. 125.

<sup>126</sup> § 609 ZPO and § 204(1, 6a-b) BGB (as drafted), and the appendix to the *Justizverwaltungskostengesetz* (as drafted).

<sup>127</sup> § 612(3-6) ZPO (as drafted).

<sup>128</sup> See Van Boom & Weber 2017, Halfmeier 2017, and Stadler 2018. See also, for instance, BRAK's *Stellungnahme zum Diskussionsentwurf* (No. 32, October 2017), available at <brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2017/oktober/stellungnahme-der-brak-2017-32.pdf>.

<sup>129</sup> *Koalitionsvertrag zwischen CDU, CSU und SPD*, 7 February 2018, p. 124-125.



### 2.2.3 England and Wales

In this section, I will discuss the following English (semi-)court-based private mechanisms of collective redress. First, the representative action (CPR 19.6) and the group action through a group litigation order, GLO (CPR 19 III), are discussed. Both mechanisms cover all areas of private law. Subsequently, I will address the enforcement order that can be issued in consumer law cases. Third, I focus on three recently designed sectoral mechanisms: the opt-in and opt-out collective action and the opt-out collective settlement action, all of which can be employed to challenge infringements of competition law. The possibility of obtaining collective redress by way of bundling claims through consolidation, joinder or a test case will be discussed in section 5.5.1. It is important to note that in England and Wales, public and private law are less strictly separated than in civil law systems, and that England and Wales have a strong focus on regulatory bodies that can also resolve mass disputes.<sup>130</sup>

In the 1990s, English civil justice was said to be in a state of crisis. The focus on litigation was strong,<sup>131</sup> but there were also serious threats to having access to justice.<sup>132</sup> This stimulated the debate on ADR,<sup>133</sup> and led to the seminal inquiry on access to justice by Lord Woolf. Among other topics of English civil procedure, the inquiry addressed multi-party litigation. In his report, Lord Woolf placed freedom of choice alongside efficiency. In order to balance both, group actions would require ‘a diminution, compromise or adjustment of the rights of individual litigants for the greater good of the action as a whole’.<sup>134</sup> In his final report, Lord Woolf listed the following objectives for multi-party actions:<sup>135</sup>

- i) it should provide access to justice where large numbers of people have been affected by another’s conduct, but individual loss is so small that it makes an individual action economically unviable;
- ii) it should provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure; and
- iii) it should achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner.

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<sup>130</sup> For instance, the Financial Conduct Authority (FCA, the former Financial Services Authority, FSA) and the Competition and Markets Authority (CMA) can approve a consumer redress scheme under the Financial Services Act 2010 (FCA) and the Competition Act 1998 as amended by the Consumer Rights Act 2015 (FCA and CMA). Such resolutions are not included in this research project, see section 1.2.3.1.

<sup>131</sup> Markesinis 1990.

<sup>132</sup> Zuckerman 1999, Genn 1999.

<sup>133</sup> Creutzfeldt 2013.

<sup>134</sup> Lord Woolf, *Issues Paper Multi-Party Actions*, 1996, consideration 2.

<sup>135</sup> Lord Woolf, *Final report*, 1996, p. 223. See also Mulheron 2005, p. 424.

These objectives now underlie the two mechanisms of collective redress as laid down in 2000 in the Civil Procedure Rules: the representative action and GLO.<sup>136</sup> Just as all English civil proceedings, the mechanisms need to be appreciated in light of the overriding objective that enables and requires courts to deal with cases justly and at proportionate cost (CPR 1.1 and 1.2).<sup>137</sup>

Under CPR 19.6, one or more class member(s) who has or have the same interest as other persons can initiate a representative action. Thus, the representative party needs to have a cause of action in its own right.<sup>138</sup> If the court allows the representative to act in this quality, it will address the common issues at hand. The scope of the representative action is limited due to the courts' narrow interpretation of 'the same interest' criterion.<sup>139</sup>

The representative rule was first introduced in 1873,<sup>140</sup> and originates from the medieval English Chancery procedure.<sup>141</sup> The representative action seems to have started as a practical and economical solution to settle common questions, instigated by the Court of Chancery's desire to make 'one lawsuit grow where two grew before.'<sup>142</sup> The representative rule was seen as 'a tool of judicial economy and litigant convenience', employed when parties were 'so numerous that you never could "come at justice"'.<sup>143</sup> The British government saw the representative action as an instrument that promotes efficiency, cost-effectiveness, and access to justice for individuals.<sup>144</sup> As an instrument to gain closure after a declaratory judgment, this efficiency was not in dispute.<sup>145</sup> However, the aforementioned constraints on providing for compensatory collective redress incited calls for further reform.<sup>146</sup>

Meanwhile, a series of large pharmaceutical multiparty cases led courts to develop management practices during the 1980s and 1990s.<sup>147</sup> This practice provided the basis for the design of the GLO. By that time, there was wide agreement that it was necessary to implement a legislative structure to deal with

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<sup>136</sup> The Civil Procedure (Amendment) Rules 2000 (SI 2000/221 (L.1)) implemented the reform of group litigation in the 1998 Civil Procedure Rules (SI 1998/3132).

<sup>137</sup> Cf. *National Bank of Greece v. Outhwaite* [2001] C.P. Rep. 69 (QBD Comm).

<sup>138</sup> Andrews 1994. See also section 5.5.2.

<sup>139</sup> See *Emerald Supplies v. British Airways* [2010] 2 W.L.R. 203 (CA). For a critical analysis of the narrow interpretation, see Mulheron 2012, who refers to a case 'pre CPR' with a similar set-back for the flexibility of the representative action, *Markt & Co v. Knight Steamship* [1910] 2 K.B. 1021 (CA).

<sup>140</sup> Mulheron 2004, p. 77 ff.

<sup>141</sup> Yeazell 1987, notably p. 40, with further references.

<sup>142</sup> Z. Chafee, as quoted by Yeazell 1987, p. 25.

<sup>143</sup> Mulheron 2012, p. 58, who refers to *Duke of Bedford v. Ellis* [1901] A.C. 1 (HL).

<sup>144</sup> Lord Chancellor's Department, *Representative Claims: Proposed New Procedures* (Consultation Paper), February 2001.

<sup>145</sup> Andrews 2001, p. 256, who refers to *Equitable Life Assurance Society v. Hyman* [2000] 3 W.L.R. 529 (HL).

<sup>146</sup> Sorabji, Napier & Musgrove 2008, Mulheron 2012.

<sup>147</sup> Hodges 2009a, p. 109.

mass disputes.<sup>148</sup> The GLO, a group action, enables English courts to deal with cases ‘efficiently, consistently, with finality, with an equitable allocation of responsibility for costs, and with due speed’.<sup>149</sup> Courts achieve this by managing large numbers of similar claims and considering common issues collectively or in (a) test case(s). As opposed to the binding effect of the representative action, where parties might be bound by the outcome of litigation without having been part of the said litigation, the GLO is an opt-in instrument.<sup>150</sup> This approach ‘recognizes that the court and the parties necessarily have to make compromises in their traditional rights for the group to make the “orderly progress” that is required.’<sup>151</sup> It is a ‘compact form of macro-justice’ in which parties are ‘shepherded into a single flock, travelling the long road to settlement without the separate consideration of a multiplicity of identical or similar issues.’<sup>152</sup>

The Injunctions Directive 98/27/EC was implemented in the UK through the Stop Now Orders Regulations 2001 (SNORs), which in 2002 was replaced by the Enterprise Act 2002. Part 8 of this act aims to strengthen consumer protection by giving enforcement bodies the authority to bring a claim for injunctive relief against businesses that do not comply with consumer law.<sup>153</sup> With the CMA (previously, the OFT) as a coordinator, the claims can be brought by various enforcement bodies, subdivided into general, designated and community enforcers. The general enforcers are the CMA and the Weights and Measures authorities, and the designated enforcers can be authorised by the Secretary of State. Community enforcers are those that are enlisted pursuant to section 4.3 of the Injunctions Directive. As of 2015, the Consumer Rights Act has amended the Enterprise Act, extending the scope of the instrument by allowing the courts to attach (where this is just and reasonable) enhanced consumer measures to the enforcement order, including compensation or other redress.<sup>154</sup>

In its further exploration of ways to obtain judicial collective redress, the UK has maintained its preference for a sectoral approach, in spite of the ‘evidence of need’ research conducted by the Civil Justice Council (CJC) in 2008.<sup>155</sup> The CJC concluded that there was an unmet need for better access to justice in various areas (competition law, finance and banking, the pharmaceutical and medical sector, employment, and consumer transactions) and, thus, for generic reform.<sup>156</sup> According to the CJC, a generic collective action would be important to both access to justice and judicial efficiency. While the Ministry of Justice accepted the need for reform, it rejected such a generic approach. It favoured a sectoral one instead, with the main reasons being the structural (regulatory) differences of the various

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<sup>148</sup> Sime & French 2015, p. 287, who refer to the Court of Appeal’s recommendation for legislative action in *Nash v. Eli Lilly* [1993] 1 W.L.R. 782 (CA), p. 810. See also the aforementioned Lord Woolf study.

<sup>149</sup> Andrews 2001, p. 258.

<sup>150</sup> Andrews 2001, p. 260.

<sup>151</sup> Hodges 2009a, p. 109.

<sup>152</sup> Andrews 2001, p. 258.

<sup>153</sup> Enterprise Act 2002, Explanatory notes, notes 455-467. The explanatory notes are not an official part of the act.

<sup>154</sup> Consumer Rights Act 2015, paras. 2 and 3, Explanatory notes, note 383.

<sup>155</sup> See Civil Justice Council, *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions: Final Report (A Series of Recommendations to the Lord Chancellor)*, December 2008 and the UK Government Response (Ministry of Justice), *Improving Access to Justice through Collective Actions*, July 2009.

<sup>156</sup> See also Mulheron 2009 and Mulheron 2011.

sectors,<sup>157</sup> and the belief that economic and other impacts of a mechanism – such as abusive litigation – are better assessed at a sectoral stage. ‘If the overall assessment were to prove negative, that might prevent further progress altogether, even though there were potential benefits to be had in some areas.’<sup>158</sup> In 2009, the British government took on the financial services sector as their first priority in this sectoral approach, with the draft Financial Services Bill.<sup>159</sup> In the proposal, a collective action for financial services claims was introduced, to be brought by any suitable representative claimant. After approval, the court would decide whether to follow an opt-out or opt-in model. However, in 2011, for political motives (a general election), the collective action initiative was dropped and deleted from the Financial Services Bill.<sup>160</sup>

In light of the aforementioned stance, it could hardly come as a surprise that the government’s main response to the EC’s public consultation on a horizontal approach to collective redress was rather sceptical. It reiterated its arguments for a sectoral approach, while noting that it supported a ‘strategic and holistic approach’ of only setting minimum standards.<sup>161</sup> ‘[I]t is not necessarily appropriate to assume that any area where injunctive relief may be obtained collectively will necessarily be suitable for compensatory redress.’<sup>162</sup> Mechanisms should only be implemented where there is an added value, a proven need – after robust assessment – for such mechanisms, as in some areas there might be little or no demand, or well developed regulatory or other enforcement authorities. If such a need was found, court-based collective redress should be a last resort; ADR and regulatory measures should be the first consideration.<sup>163</sup> The only area in which the government could foresee the need for a compensatory collective redress mechanism was competition law.<sup>164</sup> Also given ‘the currently somewhat fragile’ status of the economic climate and the risk of abusive litigation, the government claimed it would not support ‘any initiatives which it feels might damage business or the prospects of economic recovery generally.’<sup>165</sup>

In the area of competition law, collective redress mechanisms developed as follows. In various studies and white papers, the enforcement of competition law was investigated – and deemed to be insufficient.<sup>166</sup> In the discussion, the deterrent function of (the enforcement of) the Competition Act was

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<sup>157</sup> Sectoral is defined as ‘a discrete area of economic or social activity, within which particular issues, including specific types of legal claim, may arise, such as consumer protection, intellectual property, employment rights and competition law’; UK Government Response, July 2009, p. 21.

<sup>158</sup> UK Government Response, July 2009, no. 12 and 13. For more on the sectoral/generic approach debate and a critical comment on the policy decision to follow the sectoral approach, see Mulheron 2011.

<sup>159</sup> Mulheron 2011, p. 289.

<sup>160</sup> Mulheron 2011, p. 88. See also L. Armitstead & P. Aldrick, *General Election 2010: Finance Bill Watered Down in ‘Wash-Up’*, Telegraph, April 8, 2010, available at <[telegraph.co.uk/news/election-2010/7564705/General-Election-2010-Finance-Bill-watered-down-in-wash-up.html](http://telegraph.co.uk/news/election-2010/7564705/General-Election-2010-Finance-Bill-watered-down-in-wash-up.html)>. The FCA is authorized to bring an action for an injunction or approve a consumer redress scheme under the Financial Services Act 2010.

<sup>161</sup> UK Response to EC Public Consultation, no. 3 and 11.

<sup>162</sup> UK Response to EC Public Consultation, no. 17.

<sup>163</sup> UK Response to EC Public Consultation, no. 3, 4.

<sup>164</sup> UK Response to EC Public Consultation, no. 15.

<sup>165</sup> UK Response to EC Public Consultation, no. 13.

<sup>166</sup> For instance, Department of Trade and Industry, *A World Class Competition Regime (White Paper)*, July 2001.

clearly separated from the compensation function. Deterrence was to be achieved by implementing criminal sanctions and fines against those that engage in unlawful anticompetitive behaviour. The objective of compensation would have to be improved by providing 'real redress' to those harmed. Thus, as of 2002, the Competition Act 1998 gives the British consumer association Which? the option to bring an opt-in collective action at the Competition Appeal Tribunal (CAT) on behalf of at least two victims of anticompetitive behaviour that has created scattered damage (section 47B CA).<sup>167</sup> The representative action can only follow a decision from the CMA or EC that competition law has been infringed. Consumers can also consent to assign their claim to Which? In addition, in cases concerning substantial losses, harmed parties can obtain 'real redress' through individual actions (section 47A CA). This would draw private resources into the enforcement process, leaving the public authorities to focus 'on more important cases.'<sup>168</sup>

In 2007, the UK department for economic growth (BIS) published a consultation on reform.<sup>169</sup> This followed the OFT's report on the effectiveness of redress in competition law, which showed that private actions are the least effective aspect of the competition law regime. In its response, the government stated that in certain situations, private actions could complement public enforcement and thereby help to strengthen the competition framework, to tackle growth-stifling anti-competitive behaviour and enable harmed consumers and businesses to obtain redress.<sup>170</sup> Subsequently, the objectives of compensatory redress and prevention motivated the government to reduce the barriers to pursuing private actions. The costs of anti-competitive behaviour were considered to harm both individuals and the public.<sup>171</sup> The UK government deemed a reform to be necessary as the existing private actions regime was not functioning properly,<sup>172</sup> and the public competition authorities 'have finite resources and cannot do everything'.<sup>173</sup> To increase growth and level the playing field, those that infringe competition law should be held accountable.

Thus, in 2015, as part of the Consumer Rights Act, a mix of instruments was introduced to improve the (complementary) private actions regime. The reform included the establishment of CAT as a competition actions venue by, inter alia, extending their jurisdiction and remedies (stand alone in addition to follow-on cases, and injunctions). Injunctive relief was introduced because in many cases it might be more important for businesses that the anti-competitive behaviour is halted, rather than obtaining redress and damages.<sup>174</sup> Furthermore, the act introduced an opt-out collective action and – inspired

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<sup>167</sup> Competition Act 1998, section 47B, implemented with the Enterprise Act 2002. See also Department of Trade and Industry, *A World Class Competition Regime (White Paper)*, July 2001, consideration 8.17 ff.

<sup>168</sup> Department of Trade and Industry, *A World Class Competition Regime (White Paper)*, July 2001, Ch. 8, considerations 8.1 and 8.3.

<sup>169</sup> OFT Recommendations 2007, BIS Consultation 2012.

<sup>170</sup> UK Government Response to BIS Consultation 2013, no. 3.2.

<sup>171</sup> UK Government Response to BIS Consultation 2013, no. 3.11.

<sup>172</sup> For instance, since the introduction of the opt-in collective action, only one case had been brought by Which? – which failed miserably in terms of providing redress for the victims (only 130 claimants opted in, 0.1 percent of the total class). See the OFT studies in 2007 and 2011. See also section 5.5.6.

<sup>173</sup> Department for Business Innovation & Skills, *Private actions in competition law: A consultation on options for reform* – government response, January 2013, p. 3.

<sup>174</sup> UK Government Response to BIS Consultation 2013, no. 4.8.

by the Dutch WCAM – an opt-out collective settlement regulation.<sup>175</sup> This reform would have to ensure ‘that the CAT has the jurisdiction and powers needed to process cases efficiently whilst ensuring procedural fairness for both claimants and defendants.’<sup>176</sup> The aim of both instruments is to improve access to redress for consumers and businesses.<sup>177</sup> More specifically, the opt-out collective settlement aims to serve a threefold purpose: i) to obtain redress in an efficient (cost/time-effective) manner, ii) to provide closure for the infringer, both reputational-wise and financially, and iii) to help ‘ensure that litigation is the option of last resort’.<sup>178</sup> In addition, giving businesses standing would increase the deterrent effect, as it would increase the penalty for non-compliance and detection rates would increase as businesses have a greater incentive to raise an infringement.<sup>179</sup>

Collective redress through these actions may be pursued by private bodies, but only those that have a genuine interest in the case, such as trade or consumer associations (rather than only Which?) or those who have themselves suffered loss.<sup>180</sup> The representative party must be certified by the CAT. All claims must raise the same, similar or related issues of fact or law under section 49B(6).<sup>181</sup> Despite fierce opposition against enforcement by private parties, the UK government believed that enough safeguards were implemented to avoid abuse. This was another means to emphasize the government’s ‘fundamental premise’ of empowering consumers and businesses to challenge anticompetitive behaviour and to facilitate their fundamental right to seek redress.<sup>182</sup> Doing otherwise would also reduce the opportunities for the OFT (now: the CMA) to fulfil its ‘core remit’ of detection and deterrence. However, private parties such as legal firms, funders or special purpose vehicles are not allowed to bring such cases as they might be inclined to abuse the legal system. Here too, the government expressed its sectoral approach based on need, but presented another argument to limit the collective action instrument to competition law, namely, that it is novel.<sup>183</sup>

## 2.2.4 The Netherlands

Currently, the Netherlands has two general civil law mechanisms that have been designed specifically for judicial collective redress: the collective action (section 3:305a BW)<sup>184</sup> and the WCAM (section 7:907-910 BW and section 1013-1018a Rv). The functioning of both mechanisms and collective redress in general can be aided by the possibility for a court to refer a preliminary question to the Dutch Supreme Court (section 392-394 Rv). A bill to introduce a collective action for damages – supplementing

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<sup>175</sup> UK Government Response to BIS Consultation 2013, no. 3.18, p. 3, p. 12, p. 30. Consumer Rights Act, part III. Sections 47 A/B Competition Act was replaced by Para. 4 and 5 CRA. Also: the promotion of ADR to ensure that the courts are the option of last resort. [services.parliament.uk/bills/2013-14/consumerrights/documents.html](https://services.parliament.uk/bills/2013-14/consumerrights/documents.html)

<sup>176</sup> UK Government Response to BIS Consultation 2013, no. 4.1.

<sup>177</sup> CRA, Explanatory notes, consideration 417, 434 and 435.

<sup>178</sup> UK Government Response to BIS Consultation 2013, no. 6.19 and 6.26.

<sup>179</sup> BIS consultation 2012, no. 5.10.

<sup>180</sup> UK Government Response to BIS Consultation 2013, p. 34.

<sup>181</sup> Consumer Rights Act 2015, Explanatory Notes, note 437.

<sup>182</sup> UK Government Response to BIS Consultation 2013, no. 5.28.

<sup>183</sup> UK Government Response to BIS Consultation 2013, no. 5.52.

<sup>184</sup> Sections 3:305b and 3:305c Civil Code extend the right to bring a collective action to public and foreign legal bodies (those that are listed pursuant to section 4.3 of the Injunctions Directive). As explained in section 1.2.3.1, these instruments will not be discussed.

section 3:305a BW – is currently before Parliament.<sup>185</sup> In addition to the general instruments, business and consumer organizations can bring an action for the assessment of general conditions (section 6:240-242 BW and section 1003-1006 Rv). The instruments and policy on collective redress have evolved as follows.<sup>186</sup>

From the 1970s onwards, Dutch case law and doctrine started to unfold the concept of collective redress by representative organizations, and since 1980, various pieces of legislation authorized such organizations to bring claims in the interest of others.<sup>187</sup> Gradually, the idea gained ground that certain parties should have capacity to litigate in order to protect the interests of others without having to enter into specific powers of attorney or comparable arrangements.<sup>188</sup> For instance, in consumer law, the Misleading Advertising Act included the possibility for consumer organizations to apply for an order to stop or rectify misleading advertising, and the Copyright Act allowed certain representative bodies to act in the interest of authors or their successors. The growing body of legislative mechanisms correlated with jurisprudential developments. Towards the 1970s, published case law from lower courts showed an increase in cases in the areas of labour, consumer, competition and environmental law that concerned a wider ‘audience’ than just the litigating parties.<sup>189</sup> In 1983, the Supreme Court first gave standing to an association that represented other persons’ interests.<sup>190</sup> Although it constructed standing on the association’s own interest, the court ruled that in the interest of due process it would be inefficient to require aggrieved parties to bring their claim individually. Yet, in this first stage of Dutch collective redress, bringing a claim as a representative organization was a risky endeavour, as the courts were still hesitant to allow them to have standing. To some extent, this improved after a landmark ruling in 1986, brought by three environmental organizations on the dumping of dredged material. For the first time, the Dutch Supreme Court held that, under certain conditions, foundations or associations could bring a collective action to obtain injunctive or declaratory relief in the interest of others without having their own interest – even without a specific regulation that allowed them such *ius agendi*.<sup>191</sup> The Supreme Court considered that the environment concerned many diffuse as well as unspecified individuals’ interests, and that the bundling of such interests by a representative organization would provide efficient legal protection.

Subsequently, two legislative instruments followed each other at short intervals. Both regulations are still in force and both are referred to as collective action (*collectieve actie*). First, inspired by various

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<sup>185</sup> *Kamerstukken II* 2016/17, 34608, 3.

<sup>186</sup> The possibility of obtaining collective redress by way of bundling claims through joinder, a test case or assignment will be discussed in section 6.5.2.

<sup>187</sup> There are earlier traces of collective redress, such as the 1927 Collective Agreements Act (labour law), pursuant to which a union can bring a claim on behalf of employees (see Frenk 1994, p. 105, and Even 2011), and incidental case law (see Rodrigues 1988). However, it was not until the 1970s that the discussion on collective redress really took off. See, for instance, SER-advies inzake wettelijke maatregelen ter bevordering van het ordelijk economisch verkeer van 15 oktober 1971 (no. 21), p. 7, and for an overview of the case law, Verburgh 1975.

<sup>188</sup> Cf. Molenberg 1995.

<sup>189</sup> Verburgh 1975.

<sup>190</sup> HR 1 July 1983, *NJ* 1984, 360 (*LSV*). See Frenk 1994, p. 39 and 83.

<sup>191</sup> HR 17 June 1986, *NJ* 1987, 743 (*De Nieuwe Meer*). See also Braams, Hondius & Verschuur 1988.

European legislation,<sup>192</sup> in 1992, the legislator provided The Hague Court of Appeal with exclusive jurisdiction to assess whether a specific term in general terms and conditions is unreasonably onerous (*onredelijk bezwarend*). This is the collective action pursuant to section 6:240 BW. Consumer or business organizations can bring a claim to prohibit the use or promotion of (a) specific term(s). If the court orders such a prohibition, the term is (extrajudicially) voidable by any consumer. Second, in 1994, the aforementioned case law was codified with the introduction of the general collective action in section 3:305a BW.<sup>193</sup> Either a foundation (*stichting*) or an association (*vereniging*) with full legal capacity has the authority to bring such action to court. It may concern any type of civil claim and must represent the similar interests of other persons. With this collective action, injunctive or declaratory relief can be obtained, but the procedure rejects the possibility of claiming compensatory relief (see hereafter).

With the introduction of the 3:305a collective action, the legislator revoked the aforementioned defragmented legislation, with the exception of the 6:240 BW collective action. The main reason for maintaining the latter was that its scope is more general and preventive; the judicial control concerns the use of general terms and conditions in *future* contracts and requires a more abstract assessment. By contrast, the 3:305a collective action has a more specific scope; the judicial control is repressive and – in cases concerning unreasonably onerous terms – concerns those terms that are applicable to an already concluded contract in a specific situation.<sup>194</sup> Occasionally, the somewhat vague dividing line between both mechanisms gives rise to debate.<sup>195</sup>

The promotion of ways to obtain collective redress in the Netherlands was incited by the growing awareness that individual litigation in mass harm situations in certain areas, specifically in public interest matters, was incidental at most and, thus, substantive laws were not (sufficiently) enforced.<sup>196</sup> Individuals were either not prepared to or incapable of seeking redress, because their interests were insufficient or the litigation costs were too high. The legislator presumed that such thresholds for having access to justice would not exist, or to a lesser extent, for representative organizations. Although the aforementioned collective actions differ, the underlying objectives are similar. The main objective is to improve the enforcement of substantive law that, in turn, is aimed at creating a preventive and an ordering effect.<sup>197</sup> Furthermore, considerations of expediency and efficiency played a role.<sup>198</sup> The

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<sup>192</sup> In particular, the 1976 German AGBG; see *Kamerstukken II* 1981, 16983, 1-3, p. 13 and Mölenberg 1995, p. 345.

<sup>193</sup> Following *Kamerstukken II* 1986/87, 19754, 6 (*Motie Groenman*), p. 1. On the developments that led to the collective action regulation, see also Van Boom 2009.

<sup>194</sup> See Mölenberg, § 5.3.12 and Frenk 1994, p. 161-162; see also *Kamerstukken II* 1982/83, 16983, 4, p. 18, *Kamerstukken II* 1991/92, 22486, 3, p. 35 and *Kamerstukken II* 1992/93, 22486, 5, p. 10.

<sup>195</sup> See, for instance, HR 29 April 2016, ECLI:NL:HR:2016:769.

<sup>196</sup> See, for instance, *Kamerstukken II* 1975/76, 13611, 3, p. 8, and Mölenberg 1995, p. 70 ff and 99, with reference to the 1990 annual report of the *Consumentenbond*.

<sup>197</sup> For section 3:305a BW, see *Kamerstukken II* 1991/92, 22486, 3, p. 2. For section 6:240 BW, see *Kamerstukken II* 1981, 16983, 1-3, p. 13-14, 56, *Kamerstukken II* 1982/83, 16983, 4, p. 18 and *Kamerstukken II* 1983/84, 16983, 5, p. 29. See also Sandee 1995, p. 168.

<sup>198</sup> Cf. Frenk 1994, p. 37; see also *Kamerstukken II* 1991/92, 22486, 3, p. 2-3, 5.



stimulation of self-regulation and negotiation, as expressed in the requirement of consultation, intended to enhance efficiency and the preventive effect of the mechanisms.<sup>199</sup> Hence, before bringing a claim, the representative organization and the user must have renegotiated the terms (6:240 (4) BW), or the representative organization must have made sufficient attempts to achieve the objective of the action through consultations with the alleged wrongdoer (3:305a (2) BW).<sup>200</sup>

The possibility to claim damages was elaborately discussed during the parliamentary debate on the 3:305a collective action. Ultimately, an amendment abolished this option.<sup>201</sup> A collective action for damages would require – possibly complicated – individual assessment for which the action was not deemed suitable, whereas compensation could also be achieved through a voluntary settlement or individual action following the declaratory judgment. In practice, however, the need for compensatory collective redress remained. This need turned into legislation due to the DES case, which concerned pharmaceutical product liability claims.<sup>202</sup> After years of litigation, the victims' representative had reached an amicable settlement with the liable parties. In order to both compensate the victims and obtain finality, the parties wished to have the settlement declared binding. This led to the introduction of the WCAM regulation in 2005. In short, this procedure provides for one or more representative organizations, on the one hand, and the alleged liable party or parties, on the other, to submit a joint application to the Amsterdam Court of Appeal requesting it to declare legally binding a settlement that contains rights to compensation for the class members. The court assesses whether the interests of the class members are sufficiently guaranteed, in particular whether the amount of the compensation awarded is reasonable. In a nutshell, with the WCAM, the legislator has designed an enforcement mechanism that emphasizes efficiency (as to costs, time and finality) and consensual dispute resolution with 'a certain' deterrent effect.<sup>203</sup> Furthermore, compensatory relief plays an important role. Aggrieved parties can obtain damages within a relatively short period, without the risks and grievances of lengthy litigation. As a trade-off for such efficiency, the WCAM might partly abandon the goal of full compensation and provide adequate rather than full compensation, particularly given the possibility of awarding damages through damage scheduling.<sup>204</sup>

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<sup>199</sup> See *Kamerstukken II* 1981, 16983, 1-3, p. 59, SER Advies 1978, p. 26, Mölenberg 1995, p. 121, with further references, and Rinkes 2011, p. 34.

<sup>200</sup> If the organization does not meet this requirement, in general, the court will find the organization inadmissible. For the 3:305a collective action, the requirement does not constitute a very high threshold to obtain standing: a two-week period after the defendant has received a request for such consultations is sufficient. See section 6.5.4.1.

<sup>201</sup> *Kamerstukken II* 1991/92, 22486, 2, p. 30, *Kamerstukken II* 1991/92, 22486, 3, p. 29 ff and *Kamerstukken II*, 1993/94, 22486, 15.

<sup>202</sup> *Kamerstukken II* 2003/04, 29414, 3, p. 2. See also Tzankova & Lunsingh Scheurleer 2009, and section 6.5.6.1.

<sup>203</sup> See the Dutch response to the public consultation on a coherent European framework for collective redress, 2011, p. 5.

<sup>204</sup> See also the Dutch response to the Green Paper on Consumer Collective Redress, COM(2008) 794 final, p. 6.

In 2008, the WCAM regulation was evaluated.<sup>205</sup> The evaluation revealed that the WCAM meets a need, but that an examination of additional measures to improve private enforcement remains necessary.<sup>206</sup> This resulted in a number of legislative innovations and amendments. As of July 2012, section 392-394 Rv allows a district or an appellate judge to refer a preliminary question to the Dutch Supreme Court, on its own initiative or at the request of one of the parties.<sup>207</sup> It can do so if the answer is necessary to come to a decision and is of direct importance to either a mass dispute or to the resolution of numerous other, factually similar civil disputes. The purpose of this instrument is expedient redress and to support consensual negotiations. Furthermore, in July 2013, the collective action and WCAM regulations were amended, including the introduction of the possibility to apply for a pre-trial hearing (*preprocessuele comparitie*).<sup>208</sup> A request for such a hearing can be made a) by a representative organization that would be entitled to submit an application to have a WCAM settlement declared legally binding,<sup>209</sup> b) by the alleged liable party or parties; or c) through a joint application. The court has a facilitative and guiding role – it cannot judge on (a) point(s) of dispute. It may assist parties in formulating the most important matters in dispute, discuss further case management, such as the desirability of bringing a collective action, and/or stimulate parties to enter into a settlement, for instance with the aid of a mediator. Here too, the main objective is to stimulate parties to enter into or continue negotiations to conclude a collective settlement.<sup>210</sup>

Despite the aforementioned innovations, the debate on collective redress continued. The main concern was to bridge the gap between the 3:305a collective action and WCAM, particularly for those situations in which the (alleged) liable party is not willing to negotiate. In November 2011, the possibility to collectively claim for damages was proposed by a member of the Dutch Parliament.<sup>211</sup> In 2014, a draft bill was made public, but drew sharp criticism.<sup>212</sup> After a significant revision of the draft, the minister introduced the legislative proposal for a collective action for damages in November 2016.<sup>213</sup> The aim of amending the current collective action is to enhance efficient and effective collective redress, by which a balance is struck between realizing individuals' rights to damages and protecting the justified interests of those held liable. One of the main features is to stimulate collective settlements

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<sup>205</sup> *Kamerstukken II* 2008/09, 31762, 1.

<sup>206</sup> See also the motion to further investigate the private enforcement of competition law, *Kamerstukken II* 2005/06, 30071, 28, which followed the evaluation of the Dutch Competition Act.

<sup>207</sup> The Amsterdam Court of Appeal that deals with a WCAM settlement cannot make such a referral, see *Kamerstukken II* 2011/12, 33 126, 3, p. 26-27. For a critical comment on this exclusion, see Schonewille 2009, p. 79-80.

<sup>208</sup> Section 1018a Rv.

<sup>209</sup> Pursuant to section 7:907 (1 and 3, f) BW.

<sup>210</sup> *Kamerstukken II* 2008/09, 31762, 1, p. 5-6 and *Kamerstukken II* 2011/12, 33126, 3, p. 25-27.

<sup>211</sup> *Kamerstukken II* 2011/12, 33000-XIII, 14.

<sup>212</sup> Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken, Consultatieversie Juli 2014. An English summary of the consultation document is available at <internetconsultatie.nl/motiedijksma/berichten>. For criticism, see, for instance, the responses to the consultation document from Dutch employers' organizations VNO-NCW and MKB-Nederland, and from the U.S. Chamber Institute for Legal Reform; internetconsultatie.nl/motiedijksma/reacties.

<sup>213</sup> *Kamerstukken II* 2016/17, 34608, which followed stakeholder meetings organized by the Ministry and Recommendations issued by a group of lawyers.

by improving the quality of the representative parties (their governance, financing and representative-ness), the coordination of collective actions (judicial case management and the appointment of an exclusive representative organization), and the finality of a settlement agreement or judgment (opt-out technique). A settlement remains the preferred route to obtain collective redress.<sup>214</sup> The main motive for supplementing the current collective action with a claim for damages is to provide a '*stok achter de deur*': the threat to cross swords in court if an alleged liable party is not willing to negotiate, and to prevent prolonging the settlement of mass damage because aggrieved parties need to bring individual actions after a declaratory judgment. Despite – a revisited – debate on the question of need, the minister deems such a need to be present. Particularly in cases of scattered damages, where wrongdoers might withhold settlement negotiations because they expect that aggrieved parties are not inclined to bring an individual action given their relatively minor damage. The legislative proposal is in line with the Dutch stance on collective redress as stated in its response to the 2011 European public consultation. There, the government stated that private collective redress first and foremost is complementary, not an alternative aimed at reducing the burden on public regulators and, second, that a claim culture should be avoided. Its primary aim is to provide effective and efficient compensatory or injunctive relief; the objective of deterrence and punishment (in particular through punitive damages) should be the primary task of public enforcers, which are better equipped to detect infringements.<sup>215</sup>

### 2.3 Theoretical underpinning of collective redress

In the overview of the policy considerations, two main problems can be detected that have spurred the development of collective redress: inefficient and ineffective enforcement. These problems are not limited to a European context and have been a recurring theme in the literature of both legal and law and economics scholars, long before the surge of collective redress in Europe. In the following, I will touch upon some highlights of this body of literature to underpin and help clarify the European developments and the main policy objectives of collective redress.

The problem of inefficient enforcement concerns the use of already scarce (judicial) resources. If all or a large number of individual claims are pursued after a mass damage event, problems might arise such as case backlogs and inconsistent or contradictory judgments. Efforts and costs might be (partially) duplicated.<sup>216</sup> This will occur particularly with regard to positive-value claims, which concern substantial rather than trifle losses; in theory, such claims are worth pursuing individually as the potential outcome justifies the investment.<sup>217</sup> The aggregation of claims and the resolution of common issues might resolve this inefficiency, as illustrated by Yeazell with a quote from Chafee on the American class suit as early as 1932:

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<sup>214</sup> *Kamerstukken II* 2016/17, 34608, 3, p. 4.

<sup>215</sup> See the Dutch response to the public consultation on a coherent European framework for collective redress, 2011, p. 3.

<sup>216</sup> Van Dam 1975, Bernstein 1978. See also Micklitz & Stadler 2005, Keske 2009, p. 87.

<sup>217</sup> Van Dam 1975, Schaefer 2000, Ulen 2011, Wagner 2011.

*'Avoidance of multiplicity of suits saves the parties from needless expense and vexation, economizes the time of judges (...), and frees the dockets for the affairs of other litigants.'*<sup>218</sup>

A mass litigation device operated by a public or private body supplements the more traditional methods of joinder and consolidation, which 'presupposes the prospective plaintiffs' advancing *en masse* on the courts', which is not likely to happen where class members are 'isolated, scattered, and utter strangers to each other.'<sup>219</sup> More efficient dispute resolution through any mass litigation device thus concerns efficiency in the administration of the court system (administrative efficiency),<sup>220</sup> as a:

*'species of judicial vacuum cleaner, collecting into a litigative dust bag identical bits of lawsuit and thereby tidying up the courts' caseload'.*<sup>221</sup>

In addition, it improves cost-effectiveness with regard to the time and resources spent by claimants and defendants (economies of scale).

The efficiency argument only partly explains the benefit and rise of aggregate litigation. Ineffective enforcement is the other driver. According to Yeazell, this additional and more substantive justification can be found in what he describes as 'the boldest vision' of representative litigation that became 'a leading justification for the modern class action': that of Kalven and Rosenfield.<sup>222</sup> In 1941, they linked the importance of the American class suit as incited by (the attorney of) private litigants to the government's inability to sufficiently regulate large, diffuse markets and harmed individuals' lack of knowledge and incentives to bring individual claims against wrongdoers in this market, thereby creating an enforcement gap.<sup>223</sup> Individuals were unaware of the infringement and/or their rights in that respect, and/or the fact that many others had suffered a similar loss. The individuals' lack of incentives to sue has become well-known as rational apathy or rational disinterest, and is linked in particular to negative-value claims. Due to a negative individual cost-benefit analysis (the investment in a claim versus the expected outcome) such claims are not likely to be pursued.

Similar obstacles were identified in the access to justice debate, to which the Florence Access to Justice Project (1975-1978) made an important contribution. This project included a world survey on access to justice, and identified various legal, economic, social and psychological obstacles that impede the individual resolution of claims, including after a mass damage event. An important hurdle that was identified, other than the costs of litigation, is party capability. Therewith, Cappelletti and Garth refer to litigants' financial resources, legal competence (the ability to recognize and pursue a claim) and experience (one-shotters versus repeat players).<sup>224</sup> Just as Kalven and Rosenfield had done, Cappelletti and Garth observed that these barriers were particularly limiting with regard to diffuse and negative-

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<sup>218</sup> Yeazell 1987, p. 228.

<sup>219</sup> Kalven and Rosenfield 1941, p. 687 and 688.

<sup>220</sup> Van Dam 1975, p. 48.

<sup>221</sup> Yeazell 1987, p. 229.

<sup>222</sup> Yeazell 1987, p. 232.

<sup>223</sup> Kalven & Rosenfield 1941.

<sup>224</sup> Cappelletti & Garth 1978, p. 10-20, with reference to Galanter 1975.

value claims.<sup>225</sup> Diffuse interests are fragmented interests with a general rather than a mere individual scope, such as civil rights and consumer and environmental protection. Individuals either do not have the right to address infringements of such interests, or the right concerns a negative-value claim.<sup>226</sup> For reasons explained hereafter, an enforcement gap is unfavourable when the sum of such claims represents a large loss. Cappelletti and Garth ascertained that the governments' approaches to protecting those interests (incited by a reluctance to allow private bodies to do so) had not been very successful. Public bodies were inherently bound by restricted traditional roles, were susceptible to political pressure ('a grave weakness given that diffuse rights frequently have to be asserted against political entities') and they lacked expertise.<sup>227</sup>

The impediments as identified in the aforementioned studies obstruct effective access to justice, which is 'the most basic' social right and a necessity for a modern legal order.<sup>228</sup> Ineffective access to justice with regard to fragmented and meritorious claims is deemed problematic not only on an individual level, but also for society at large as it leads to underenforcement and therewith endangers the objectives of substantive rights to regulate, prevent and/or compensate.<sup>229</sup> From a law and economics perspective, the enforcement deficit (a market failure) is problematic because wrongdoers are not incentivized to comply with the law and do not internalize the negative externalities (damage to individuals and society) that they have created. In order to optimally achieve the deterrent and preventive function of law – and thus to increase social welfare – the wrongdoer needs to redress this damage in full.<sup>230</sup> Basically, the legally desired behaviour will occur when misbehaving is more expensive than behaving. The prospect of liability will incentivize potential wrongdoers to comply with the law and take precautions against causing harm.<sup>231</sup>

Collective redress mechanisms aim to overcome – part of – this enforcement gap.<sup>232</sup> From the legal point of view, this improves access to justice and provides individuals with a (cost-effective) tool to obtain redress. From the perspective of law and economics, collective redress provides a potentially powerful device to promote social welfare.<sup>233</sup> It can redress the imbalance of power between and distribute wealth among the various social actors, such as large corporations and consumers. Therewith, collective redress pursues the common economic objectives of (cost-effectively) correcting market failures, bridging the gap that individual litigation and regulation have left uncovered, and deterring wrongdoers from (future) misconduct.<sup>234</sup> 'This, in the economic analysis of law, is not regarded as

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<sup>225</sup> Cappelletti & Garth 1978, p. 21, Kalven & Rosenfield 1941, p. 684.

<sup>226</sup> Cappelletti & Garth 1978, p. 18.

<sup>227</sup> Cappelletti & Garth 1978, p. 37. See also section 3.4.1.

<sup>228</sup> Cappelletti 1978, p. 8-9.

<sup>229</sup> Kalven & Rosenfield 1941, p. 686.

<sup>230</sup> Schaefer 2000, p. 184, Kocher 2010, p. 118, Backhaus, Cassone & Ramello 2012, p. 3, referring to the seminal papers of Calabresi (1961) and Olson (1965), Van den Bergh 2013, p. 14 and 20, and Faure & Visscher 2015, p. 9-12.

<sup>231</sup> Wagner 2011, p. 63.

<sup>232</sup> Cf. Hensler 2010, p. 152. Obviously, there are other methods, such as public enforcement, small claims procedures and ADR. See, for instance, Stuyck e.a. 2007, Hodges, Benohr & Creutzfeldt-Banda 2012, Weber 2014, Kramer & Kakiuchi 2015 and Hodges 2015.

<sup>233</sup> Kalven and Rosenfield 1941.

<sup>234</sup> Kocher 2011, Cassone & Ramello 2012, p. 106-110, and Biard 2014, par. 2.2.1 and 2.2.2.

merely a desirable side-effect of civil litigation, but as its main goal. The desire to improve the accessibility of civil litigation is hence not only important in the legal view focusing on fairness, but equally so in the welfare-oriented economic view.<sup>235</sup>

## **2.4 The objectives of collective redress mechanisms**

### **2.4.1 Modify behaviour, individual (compensatory) redress, and efficiency**

The policy objectives of collective redress mechanisms are not always well defined, uniformly described or interpreted.<sup>236</sup> This is illustrated by the plethora of terms that national and European policy makers employ to describe the objectives of collective redress mechanism. Various scholars, too, have described the objectives in various wording or interpretations.<sup>237</sup> This variety correlates with the design of the mechanism, such as its scope, the type of law it addresses and the relief it provides, and other specific characteristics. The complexity of filtering the objective(s) also lies in the fact that collective redress embodies more than the protection of amalgamated individual interests. It is hybrid, in the sense that it addresses or even merges private and public interests. Thus, it sometimes focuses on a mix of the objectives of the norms that protect those interests and the ensuing enforcement techniques.<sup>238</sup> Collective redress mechanisms blur the traditional division between private enforcement (of norms that are) aimed at individual redress (compensation/restoration), and public enforcement (of norms that are) aimed at controlling or modifying behaviour (prevention and deterrence). This 'stage sharing' of objectives has also raised the question of which enforcers are (or should be) allowed to pursue them. In the US, private enforcement of public interests through litigation (in particular, class actions) has long been considered a regulatory instrument.<sup>239</sup> Hence, entrepreneurial initiatives might have encountered less opposition as they have in Europe, even though aggregate litigation is clearly not only the bearer of good news.<sup>240</sup> In the European debate, however, the (alleged) drawbacks of the US-approach lie at the heart of the resistance against or the straightforward rejection of a US-style class action. Now that collective redress is nevertheless gaining a more prominent role in European jurisdictions, and private techniques that also enforce public interests have been adopted to complement public enforcement, a tension emerges as to private (entrepreneurial) parties. Assessing the pros and cons of such parties first of all requires a consensus on the main objective(s) that a mechanism aims to pursue. Based on the previous sections, three common objectives can now be identified.

The traditional mechanisms of collective redress centre on addressing and modifying wrongdoers' behaviour (prevention and deterrence) and incentivizing them to comply with, for instance, consumer

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<sup>235</sup> Visscher & Schepens 2010, p. 28. See also Hess e.a. 2011, p. 12, and Jackson 2010, p. 117.

<sup>236</sup> Cf. Layton 2012, p. 96.

<sup>237</sup> See, for instance, Wagner 2011, p. 59-61 (compensation and deterrence), Steele & Van Boom 2011, p. 21-24 (compensation, deterrence and peace), Hodges 2011 (behaviour control and compensation), Stadler & Micklitz 2005, p. 17-19 (prevention, access to justice & procedural economy), and Hodges 2008, p. 187-216 (access to justice, enhancing the economy, regulation through litigation, deterrence and behaviour modification, regulatory and enforcement theory, and restorative justice).

<sup>238</sup> Cf. Steele & Van Boom 2011, p. 1 and Hodges 2011, p. 102-106.

<sup>239</sup> See, for instance, Hodges 2011, p. 104 and Marcus 2014, p. 123.

<sup>240</sup> See Chapter 3.

law.<sup>241</sup> This objective focuses on the interests of society at large rather than providing individual redress. Such collective redress mechanisms developed in the second ‘wave’ that followed the recognition of enforcement problems in the development of the welfare state.<sup>242</sup> The primary chosen remedy to achieve the objective of modifying behaviour was injunctive relief, brought by (semi) public enforcers. As mentioned by the EC, such an instrument would render dispute resolution and compensation redundant.<sup>243</sup> The most notable example is the German *Verbandsklage*, which primarily serves to protect non-individual (abstract) interests, thereby fulfilling the public or social function of enhancing legal protection and welfare.<sup>244</sup>

The objective of modifying behaviour, the chosen remedy and/or the utilization thereof by (semi-)public enforcers appeared insufficient, and consequentially the enforcement gap was not sufficiently bridged. This incited the focus to slowly shift towards compensatory relief. It is relatively recently that providing individuals with the opportunity to obtain compensation has gained ground as an objective of *collective* redress. Previously, the right to seek redress was an individual’s prerogative, related to the concept of private law that ‘adheres to individual entitlement and responsibility as the foundation of private law relationships’.<sup>245</sup> The shift towards this (additional) objective is visible, *inter alia*, in the Dutch instruments WCAM and – if it passes into law – collective action for damages, and the English collective actions in competition law cases. In principle, such mechanisms are said to follow substantive law, in particular the law of damages that centres on the principle of full compensation – but see section 2.4.3 hereafter.<sup>246</sup>

The third objective of collective redress mechanisms, efficient dispute resolution, has developed independently from the former two, incited by inefficient rather than ineffective enforcement. With this objective, the procedural device is not merely a means to enforce substantive rights but serves its own social function as well.<sup>247</sup> As mentioned, the efficient resolution of mass damage entails administrative efficiency: a large number of claims or essential questions that relate to these claims are adjudicated in aggregation, overflowing court dockets are avoided and uniformity in judgments is improved. Moreover, aggregation aims to result in adjudication within a reasonable period of time at decreased costs and efforts due to economies of scale. Third, it provides closure, peace or finality for all parties involved. Hence, this objective serves both individual and public interests. These efficiency purposes are most visible in the mechanisms that were created after mass disasters or mass exposure events: the German KapMuG (created against the backdrop of the Deutsche Telekom case), the Dutch WCAM (DES and Dexia cases), and the English GLO (pharmaceutical cases).

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<sup>241</sup> Compliance can be considered an overarching aim, that is, the objective(s) of a rule is or are reached by means of compliance therewith; Van Boom 2006, p. 7-11.

<sup>242</sup> Capelletti & Garth 1978, p. 21-54. See section 2.3.

<sup>243</sup> Commission’s Green Paper on consumer access to justice, COM(93) 576 final, p. 7. See section 2.2.1.

<sup>244</sup> Cf. Koller 2014, p. 37 and 41.

<sup>245</sup> Van Boom 2014, p. 3. See also Wagner 2011. English law allows for nominal damages (damages without loss) and exemplary damages, but the principle of full compensation is the rule from which these exceptions depart; see Wagner 2011, p. 60, with further references.

<sup>246</sup> Waelbroeck, Slater & Even-Shoshan 2004, p. 3, Van Boom 2014, p. 5.

<sup>247</sup> On such a function see Capelletti & Garth 1978, p. 9, referring to the work of Franz Klein in the early 1900s.

### 2.4.2 The three main objectives and access to justice

The following three main objectives of collective redress mechanisms will serve as a starting point for the analysis of entrepreneurial mass litigation:

- i) Modify behaviour: prevention and deterrence (by way of the internalization of the harm caused) – aimed at the wrongdoer and at protecting society (social welfare)
- ii) Compensatory/restorative redress – aimed at enabling the individually aggrieved parties to be restored to the position they would have been in had the wrongful behaviour not occurred (do justice, resolve the conflict)
- iii) Efficient dispute resolution: timely, final, cost-effective and consistent administration of justice – aimed at all parties involved: the aggrieved parties, wrongdoer(s), judiciary and society.

On various occasions in both the European and national debates, access to justice is presented as a separate policy objective of collective redress. Its specific content or meaning in the context of collective redress, however, is often ambiguous. As observed by Cappelletti and Garth, access to justice is a vague notion that can be approached from various perspectives, but in essence focuses on the core of a legal system: one that is equally accessible to all and leads to results that are individually and socially just.<sup>248</sup> Later, legal scholars further clarified the concept by distinguishing justice in the formal, procedural or non-value sense (access to dispute resolution mechanisms and legal services) and justice in the substantive or value-oriented sense (access to just and fair dispute resolution).<sup>249</sup> Both perspectives can be recognized in the policy documents on collective redress. In the following, access to justice will not be considered to be a separate objective, but as an overriding objective or a means to an end in order to achieve the aforementioned objectives.<sup>250</sup> Inasmuch as access to justice is not yet addressed by the mere existence of a collective redress mechanism (effective access to a remedy) and its design (fair process, such as the right to be heard, the review of a collective settlement, and so on), the procedural side of access to justice is considered part of the objective of efficiency (timely and affordable access, rectitude of outcome). The substantive side of access to justice can be recognized in the objective of justice and individual compensation as a means of fair redress. Access to justice will also be addressed in the discussion on the benefits and drawbacks of entrepreneurial parties, as they potentially enable claimants to file a claim and improve or deteriorate fair dispute resolution (equality of arms and abusive litigation).

### 2.4.3 Clustering the objectives, and trade-offs

As observed in section 2.2, most collective redress mechanisms choose to serve more than one objective. With the emergence of the objective of compensation, the objective of modifying behaviour did not become deleted, but was relocated instead. For many mechanisms, deterrence can now be said

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<sup>248</sup> Cappelletti & Garth 1978, p. 6 and Garth & Cappelletti 1978, p. 182.

<sup>249</sup> Rhode 2013, p. 532, Wrška 2015, p. 39. See for an overview of the various meanings of access to justice, Wrška 2015, p. 5-30.

<sup>250</sup> See, similar, Wrška 2015, p. 113.



to occupy ‘the backseat (...) as a welcome “by-product”’.<sup>251</sup> Even if the primary objective is compensation, deterrence and prevention can still be strived for: the larger the total amount of damages claimed, the larger the internalization by wrongdoers, the larger the potential deterrent effect.<sup>252</sup> Policy documents on the private enforcement of competition law provide an illustrative example of clustering objectives and listing them in the order of priority. In 2005, the Commission equated the objective of compensating harmed parties with that of deterring unlawful behaviour. This was met with fierce criticism and in 2008, a hierarchy was arranged: (full) compensation was to be considered the primary guiding principle, which, in turn, would benefit the objective of deterrence.<sup>253</sup> The latter remained the primary objectives of public enforcers. This approach recurred in the 2013 Recommendation. Due to its association with punitive damages and ‘American situations’, deterrence was ranked as an inherent benefit or positive side-effect rather than a primary objective. The principle of full compensation requires that damages should cover, but not exceed, the harm suffered by a private party.<sup>254</sup>

Nevertheless, as a result of clustering, trade-offs might take place. This is visible, for instance, in the choice of technique to include or exclude class members. Most mechanisms, so far, employ an opt-in technique. Hence, class members need to activate their participation in the action, whereas the opt-out technique requires a class member’s active withdrawal and if not (properly) done so, the individual loses its right of action. The opt-out technique thus trades off part of the concept of individual autonomy, which corresponds with the objective of compensation, for that of efficiency and deterrence. Furthermore, when the mechanism allows for damage scheduling, such as the WCAM, the principle of full compensation is traded off for the objective of efficiency.

## 2.5 Summary: the collective redress mechanisms and their objectives

To conclude this chapter, Table I summarizes the current collective redress mechanisms as described in section 2.2 and their main features. The overview is based on (my interpretation of) the policy documents and the mechanisms’ legal features. The details of the rules will be discussed in more detail in Chapters 4 to 6.

The overview first shows the type of party that is allowed to initiate the specific action and the way this representative party is qualified and/or assessed: by law, court, and/or public authority. Furthermore, it shows the technique that determines the formation of the group or class. By way of the opt-in or opt-out technique class members are included or excluded from participating in the action and from being bound by the decision (*res judicata*). Normally, a group action requires class members to opt in; for instance, the English Group Litigation Order and the German KapMuG. A representative action can employ (n)either technique. For instance, the Dutch WCAM and the English collective proceedings are opt-out mechanisms, where class members have to actively withdraw from the action or settlement if they do not wish to be bound by it. Representative actions that address a common good and/or do not serve identified persons but a public interest employ neither technique; for instance, the German skimming-off procedure. Although the damage might be individual, it is of such a value or

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<sup>251</sup> Wagner 2011, p. 59.

<sup>252</sup> See, for instance, Keske, Renda & Van den Bergh 2010, p. 61 and Koch 2014, p. 161.

<sup>253</sup> See section 2.2.1. See also Wagner 2011, p. 56-57.

<sup>254</sup> See, for instance, Communication COM(2013) 401 final, p. 9-10.

diffuse nature that compensation is deemed unnecessary, impossible or inefficient. The Dutch 3:305a action is a somewhat hybrid mechanism: individual class members are not formally bound by the action, yet they can object to it. Since a judgment does have an informal binding authority, the collective action can turn into an opt-in mechanism once the outcome leads to a settlement.

The overview also shows the scope of the instrument, the type of relief it can provide for (injunctive, declaratory and compensatory relief) and the type of damage it addresses. The type of damage and relief often correlate with the mechanism's pursued objective. The ones that allow for the pursuit of negative-value claims will serve the objective of deterrence, whereas positive-value claims such as mass torts will strive for efficient dispute resolution and compensation for the aggrieved parties. The pursuit of a common good aims to serve the objective of modifying behaviour (compliance/prevention/deterrence) by providing for injunctive relief.

Instrument	Representative / lead claimant	Qualification Representative	Technique of inclusion/exclusion	Scope	Remedy	Addressed damage	Primary objective(s)	Tandem objective
<i>Unterlassungsklage</i> (GE)	Designated enforcement body	Law, public authority & court	-	Consumer and competition law	Injunctive relief	Abstract	Control behaviour	Compensation
<i>Gewinnabschöpfungsklage</i> (GE)	Designated enforcement body	Law, public authority & court	-	Competition law	Skimming-off illegal profit	Scattered	Control behaviour	-
<i>KapMuG</i> (GE)	Selected harmed party	Court	No-option rule (see section 4.5.4) and opt-out if settled	Securities	Declaratory and compensatory relief	Any	Efficiency Compensation	Control behaviour
<i>Representative action</i> (CPR 19.6) (EW)	Harmed party/parties	Court	Semi opt-out	Private law	All	Any	Efficiency	Compensation
<i>GLO</i> (EW)	Harmed party (lead claimant/solicitor)	Court	Opt-in	Private law	All	Any	Efficiency Compensation	Control behaviour
<i>Collective proceedings</i> (EW)	Genuinely representative body	Law & court	Opt-in or opt-out	Competition law	All	Any	Compensation Control behaviour Efficiency	-
<i>Collective settlement</i> (EW)	Genuinely representative body	Law & court	Opt-out	Competition law	Settlement declared binding	Any	Compensation Control behaviour Efficiency	-
<i>Enforcement order + ECM</i> (EW)	Qualified enforcement body	Law, public authority & court	Opt-in	Consumer law	Injunctive and compensatory relief	Abstract (EO) Any (EO+ECM)	Control behaviour Compensation (EO+ECM)	
<i>Collectieve actie 3:305 a BW</i> (NL)	Foundation / association	Law & court	Formally, it only binds litigants. For tandem goal: opt-in	Private law	Declaratory and injunctive relief	Any	Control behaviour Efficiency	Compensation
<i>WCAM</i> (NL)	foundation / association	Law & court	Opt-out	Private law	Settlement declared binding	Any	Compensation Efficiency	Control behaviour
<i>Toetsing AV, 6:240 BW</i> (NL)	Any legal entity	Law & court	-	Consumer law (Terms & Cond.)	Declaratory relief (Terms & Cond. voidable)	Abstract	Control behaviour (cessation, prevention)	-

Table I: Overview of the current private judicial collective redress mechanisms in the Netherlands, Germany and England & Wales

### 3 Entrepreneurial mass litigation and its potential benefits and drawbacks

*‘There is a real sense that Europe does not want its market regulation to fall into the hands of profit-motivated intermediaries who have an incentive to increase litigation for its own sake. (...) Whilst one would not want this to become a charter for bounty-hunters dressed up as consumer activists, equally, there is a risk that [a collective redress] mechanism will not be used in practice if consumer organizations cannot be incentivized to invoke the procedure.’<sup>1</sup>*

#### 3.1 Introduction

As Chapter 2 has shown, the three selected jurisdictions, as well as the European Union, traditionally authorize designated or qualified (non-profit) bodies to pursue collective redress. Nevertheless, various types of entrepreneurial parties have entered the European mass litigation market. These parties are the focus of attention in this chapter. This chapter addresses the potential benefits and drawbacks of entrepreneurial mass litigation and how they affect the chosen policy objectives. Before addressing that question, section 3.2 briefly sketches the development of entrepreneurial mass litigation and section 3.3 describes the types of entrepreneurial parties that currently operate in the mass litigation market in Germany, England and Wales, and the Netherlands. Both sections provide general overviews; specific rules and features of the parties and the market in which they operate will be discussed in more detail in Chapters 4-6. The chapter subsequently examines the advantages and disadvantages of entrepreneurial parties (sections 3.4 and 3.5). What does legal doctrinal, law and economics and empirical literature tell us about the – potential – incentives that an entrepreneurial interest in litigation creates? And how might these incentives influence the objectives as described in Chapter 2? The answers to these questions are mainly based on the literature on overseas experiences (the USA and Australia), which provide experiences that can be used as a source of inspiration.<sup>2</sup> The chapter concludes with a summary in section 3.6.

#### 3.2 The development of entrepreneurial mass litigation

##### 3.2.1 The origins

The term entrepreneurial litigation or lawyering stems from the USA.<sup>3</sup> Within the context of this book’s topic, it refers to attorneys who act as risk-taking entrepreneurs by investing in class actions with the aim of obtaining a profit. The main route for doing so is by obtaining part of the class action proceeds (common fund, see hereafter). Historically, American courts deemed contingency fee contracts to be void and unenforceable due to the common law rules on maintenance and champerty.<sup>4</sup> Champerty is defined in the USA as ‘[a]n agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant’s claim as consideration for receiving part of any

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<sup>1</sup> Fairgrieve & Howells 2009, p. 383 and 408.

<sup>2</sup> See section 1.2.4.1.

<sup>3</sup> See, for instance, Coffee 1987 and Coffee 2015.

<sup>4</sup> Radin 1935, Karsten 1998, p. 234 ff, Coffee 2015, p. 19 ff.

judgment proceeds'.<sup>5</sup> Whereas, to date, these doctrines continue to play a role in English litigation funding,<sup>6</sup> in the USA they started to lose ground in the 1800s, that is, where it concerns contingency fees.<sup>7</sup> Around the 1850s, certain states had authorized contingency fee arrangements, and courts had increasingly acknowledged the benefit of contingency fee arrangements for 'those of modest means'. By the late 1800s, attorneys and their clients would use contingency fee arrangements in various types of cases, including personal injury litigation, and the Supreme Court regarded such an arrangement a 'legitimate and honourable professional assistance'.<sup>8</sup> Karsten offers three explanations for this acceptance: procedural reforms, political developments (democracy, distrust of corporations) and the religious nature of 'antebellum Americans [who] were "awash in a sea of faith"'.<sup>9</sup> In this Age of Jackson, 'an era of populism that celebrated the common man', access to courts was simplified and contingency fees were increasingly accepted, particularly in states with politically accountable judges who feared political repercussions.<sup>10</sup> Moreover, courts argued that contingency fees 'constituted a better guarantee for fidelity, energy and proper zeal from one's attorney than the fee certain'.<sup>11</sup> The focus on access to justice and the deregulation of attorney fees under the ideology of *laissez faire* also incited exchanging the English rule of 'the loser pays' for the American rule that parties would bear their own litigation costs, regardless of the outcome.<sup>12</sup> To date, the American rule prevails, but due to contract practices and statutory provisions that allow for one-way costs shifting in the claimants' favour (only the defendant can be ordered to pay adverse costs), the rule is said to 'resemble a Swiss cheese'.<sup>13</sup>

Over time, various scandals and problems led to restrictions on contingency fee arrangements within the context of class actions. Whereas fee arrangements in individual litigation have remained largely unregulated, nowadays, the class attorney is not allowed to enter into a fee arrangement with the lead plaintiff in class actions. This restriction aims to avoid distorting the latter's incentive to represent the absent class members' interests.<sup>14</sup> Instead of individual contingency fees, the common fund doctrine provides the economic engine that drives class actions. In the case of success, the class counsel receives a 'reasonable fee' out of the successful action's proceeds (the common fund).<sup>15</sup> This remuneration structure aims to avoid conflicts of interest between class members and to resolve the free-rider

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<sup>5</sup> Black's Law Dictionary 2009 (Ninth Edition), p. 262.

<sup>6</sup> See section 5.4.2.

<sup>7</sup> The doctrines remain relevant with regard to third-party funding and the alienability of claims, see Sebok 2011.

<sup>8</sup> Karsten 1998, p. 249, with reference to *Wright v. Tebbits*, 91 U.S. 252, 254 (1875).

<sup>9</sup> Karsten 1998, p. 244 ff.

<sup>10</sup> Coffee 2015, p. 19.

<sup>11</sup> Karsten 1998, p. 241.

<sup>12</sup> Coffee 2015, p. 22 ff.

<sup>13</sup> Coffee 2015, p. 25-26. The statutory one-way costs shifting rule has been implemented for many types of socially desirable aggregate litigation, for instance, regarding civil rights and environmental law. See also Hensler 2010, p. 157.

<sup>14</sup> See Jones 2008, Hensler 2010, p. 155 and 157, and Coffee 2015, p. 64-77 on the Milberg, Weiss scandal, where four attorneys, specialists in securities class actions, were imprisoned for paying 'kickback payments' to their 'in-house' plaintiffs in order to incentivize them to act as lead plaintiff and to improve their chances of being selected as class counsel.

<sup>15</sup> The rationale of the common fund doctrine lies in the principle of unjust enrichment, as decided by the US Supreme Court in two railroad insolvency cases: *Trustees v. Greenough* 105 U.S. 527 (1881) and *Central Railroad & Banking Co.*

problem. The judicial supervision and determination of the attorneys' remuneration are considered crucial elements of an effective class action/settlement regime.<sup>16</sup> The court reviews and awards the fee and informs the class members, who are entitled to raise their objections against the proposed fee award.<sup>17</sup> The fee is calculated either by determining a percentage of the proceeds (a percentage-of-the-settlement approach), or by awarding a reasonable hourly fee, possibly uplifted by a multiplier (the lodestar approach). The percentage or multiplier chosen depends on factors such as the result, type, complexity and duration of the action and the amount of the proceeds (the percentage declines as the proceeds increase).<sup>18</sup> If the percentage approach is followed, a lodestar cross-check can take place. Some courts apply a fixed benchmark percentage, others consult historical statistics in comparable cases and/or market rates. The percentage is based on the proceeds or on the amount actually distributed. Both the percentage and lodestar approach have been criticised. The percentage approach because it might create a disproportionate fee in relation to the attorneys' time spent and the effort made; the lodestar approach because it incentivizes attorneys to spend too much time on the case. Although the method for calculating the award is subject to judicial discretion and depends on the circumstances of the case, nowadays, the majority of the courts dealing with common fund cases are said to prefer the percentage approach.<sup>19</sup> The lodestar approach is mainly employed in cases under fee shifting statutes, such as consumer actions, or when the percentage approach cannot be applied or would lead to an unfair result.<sup>20</sup>

So far, third-party litigation funding is limited in the US class action market,<sup>21</sup> although it is increasingly sprouting in some states.<sup>22</sup> This type of litigation funding has its origins in Australia, where it has developed into an accepted form of litigation funding in the past 20 to 25 years.<sup>23</sup> Here, it is not the attorney but a third-party investor that is the beneficiary of part of the proceeds of a funded claim. In Australia, too, such funding used to constitute a crime and/or tort due to the rules of maintenance (encouraging litigation) and champerty (funding litigation for profit). Nowadays, the concepts are obsolete as crimes in common law, and various Australian jurisdictions have abolished them as statutory crime and tort – although courts can still find contracts to be contrary to public policy or otherwise

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of *Georgia v. Pettus* 113 U.S. 116 (1885). See Coffee 2015, p. 18, 26 ff, Hensler 2010, p. 158, and Dawson 1974, p. 1602 ff.

<sup>16</sup> Eisenberg, Miller & Germano 2017, p. 938.

<sup>17</sup> Federal Rules of Civil Procedure 23(h); on the origins thereof see the Report of the Judicial Conference Committee on Rules of Practice and Procedure, September 2002, p. 19-21 and the Report of the Civil Rules Advisory Committee (Appendix B), p. 116-122; available at <[uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2002](http://uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2002)>.

<sup>18</sup> Eisenberg & Miller 2004a; Eisenberg & Miller 2010, Fitzpatrick 2010, and Eisenberg, Miller & Germano 2017. See also the landmark ruling in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974).

<sup>19</sup> Fitzpatrick 2010, p. 831-832.

<sup>20</sup> See American Law Institute, *Principles of the Law of Aggregate Litigation* 2010, § 3.13, and Gensler 2017, Rule 23, Class actions.

<sup>21</sup> Hensler 2011, p. 323, Kalajdzic, Cashman & Longmoore 2013, p. 95, Issacharoff 2014, p. 576 ff. On the difference between the 'first wave' and 'second wave' of litigation funders (lenders respectively institutional investors) see Garber 2010 and Steinitz 2011.

<sup>22</sup> Hodges, Peysner & Nurse 2012, p. 43 ff, Morpurgo 2014, p. 22 ff, Liston, Patchen & Plochocki 2016.

<sup>23</sup> Kalajdzic, Cashman & Longmoore 2013, p. 96 ff, McGovern e.a. 2010, p. 69, De Morpurgo 2014, p. 19.

illegal.<sup>24</sup> Third-party funding was first allowed and used in insolvency cases in 1995,<sup>25</sup> and has expanded to class actions from around 2004 onwards, in particular in securities and competition law cases.<sup>26</sup> The 'entrepreneurial spirit of the legal profession' first found its way into class actions through law firms that would pursue such actions by entering into conditional fee arrangements with individual class members.<sup>27</sup> However, such a funding construction turned out to be insufficient to fund class actions, and third-party funders entered the scene.<sup>28</sup> Whereas two law firms have long been the main suppliers of class actions, this is now gradually changing, also due to the availability of third-party funding.<sup>29</sup> The acceptance of third-party litigation funding in Australia is said to stem from austerity cuts that decreased public legal aid funding, and from funding difficulties in class actions: a lack of the necessary means to pursue such litigation and the cost risk that arises from the loser pays rule.<sup>30</sup> As the other class members enjoy immunity from adverse costs orders, parties are disincentivized to act as a representative party. If they nevertheless do so, the immunity of class members leaves successful defendants in an unfavourable position as their opponent, the representative party, might not have sufficient means to pay the costs order. Nowadays, third-party litigation funding is the main enabler of Australian class actions.<sup>31</sup> As, in general, the assignment of a bare right to litigate is not allowed, the funders receive a percentage of the proceeds from the class action. This can be arranged through individual contracts with class members or, in the absence of such an arrangement, the court might order all class members to contribute to the litigation funding costs.<sup>32</sup> Whether law firms should be able to conclude contingency fee arrangements is currently under debate following recommendations to do so by an Australian governmental working group.<sup>33</sup>

### 3.2.2 In Europe

As most collective redress mechanisms in European jurisdictions are still relatively new and, so far, have focused mainly on (semi-)public bodies to operate the devices, entrepreneurial mass litigation is in its infancy. Yet it is on the rise, and has developed along the following lines.

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<sup>24</sup> Standing Committee of Attorneys General, *Litigation funding in Australia. Discussion Paper*, May 2006, p. 5.

<sup>25</sup> Standing Committee of Attorneys General, *Litigation funding in Australia. Discussion Paper*, May 2006, available at <[justice.nsw.gov.au/justicepolicy/Documents/litigationfundingdiscussionpapermay06.pdf](http://justice.nsw.gov.au/justicepolicy/Documents/litigationfundingdiscussionpapermay06.pdf)>, p. 5.

<sup>26</sup> Legg 2008, p. 669, Morabito & Waye 2011, p. 331, Legg e.a. 2011, p. 628, Kalajdzic, Cashman & Longmoore 2013, p. 96.

<sup>27</sup> Morabito & Waye 2011, p. 331; see also Australian Government Productivity Commission, *Access to Justice Arrangements. Inquiry Report No. 72, Volume 2*, September 2014, available at <[pc.gov.au/inquiries/completed/access-justice/report](http://pc.gov.au/inquiries/completed/access-justice/report)>, p. 603-605.

<sup>28</sup> The High Court of Australia first allowed third-party funding in 2006 in *Campbells Cash and Carry v. Fostiff* (2006) 229 CLR 386.

<sup>29</sup> Morabito 2017, p. 35.

<sup>30</sup> Morabito & Waye 2011, p. 329 ff, Kalajdzic, Cashman & Longmoore 2013, p. 97-98.

<sup>31</sup> Morabito & Waye 2011, p. 325, Kalajdzic, Cashman & Longmoore 2013, p. 96.

<sup>32</sup> Kalajdzic, Cashman & Longmoore 2013, p. 108, Waye & Morabito 2017, p. 167, 178, and Waye & Morabito 2018, referring to, inter alia, *Pathway Investments v. National Australia Bank* [2012] VSC 625, and *Money Max v. QBE Insurance Group* [2016] FCAFC 148.

<sup>33</sup> Australian Government Productivity Commission, *Access to Justice Arrangements. Inquiry Report No. 72, Volume 2*, September 2014, p. 625-629. See also Waye & Morabito 2017, p. 165.

In the early days of European (injunctive) collective redress, governments would subsidize certain private representative organizations, particularly in the area of consumer law, to – also – initiate collective redress. For instance, in the Netherlands, the consumer bodies Consumentenbond and Konsumenten Kontakt could apply for government funding to initiate collective actions, as such actions would render governmental action superfluous.<sup>34</sup> The European Commission also subsidized collective actions by consumer associations, for (cross-border) injunctions to eliminate unfair terms in several member states.<sup>35</sup> National public bodies could pursue collective redress as well.<sup>36</sup> However, over the years it seemed that public funding and (semi) public enforcement did not suffice. For instance, one of the main obstacles identified in the evaluation of the 2001 Injunctions Directive was the lack of resources by (semi-)public bodies in light of the financial risks of litigation.<sup>37</sup> Moreover, despite the European Commission's pleas to member states to increase their expenditure on legal aid, the public funding of legal aid started to decline in the mid-1990s, and austerity measures have been increasing ever since, not only with regard to subsidized legal aid but also court fees.<sup>38</sup> Hence, the budgets of potential intermediaries such as consumer organizations were limited, and the risk of severe losses was high due to the loser pays rule which has been adopted in most EU member states.<sup>39</sup> As a consequence of the protective function of this rule – it aims to filter out frivolous claims – the cost risk of losing is duplicated: not only does the loser pay its own litigation costs, it is also ordered to pay (part of) those of its prevailing opponent.

The enforcement gap might have other explanations as well. Private non-profit organizations have been faced with a decreasing number of members (and, thus, membership fees), and both private and public bodies have a range of tasks that extend (well) beyond litigating.<sup>40</sup> As dispute resolution is not their core business, non-profit organizations might also lack expertise and display risk-averse behaviour towards litigating, given the required investment, uncertainty and cost risk.<sup>41</sup> Moreover, they

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<sup>34</sup> *Kamerstukken II* 1983/84, 16983, 8, p. 22, *Kamerstukken II* 1984-85, 18600, 17, p. 8 and 20 ff., and *Nota II* Inv, PG, Inv. 3, 5, 6, p. 1772. See also Mölenberg 1995, p. 125-126, 131, 337. Other examples are the German *Verbraucherschutzvereine*, which is a private body but largely subsidised; see COM(2000) 248 final, p. 21, and Gousgounis 2009, p. 2: 'State authorities make sure that the associations have the appropriate resources and quality services to play that role.'

<sup>35</sup> COM(2000) 248 final, p. 9.

<sup>36</sup> Such as the UK Office of Fair Trading; see for more examples the Commission's Green Paper on Access of consumers to justice of 16 November 1993, COM(93) 576 final.

<sup>37</sup> EC Report on the application of the Injunctions Directive, COM(2008) 756 final, consideration 32. See also section 2.2. See also the EC White Paper on damages actions for breach of antitrust rules, COM(2008) 165 final, p. 4.

<sup>38</sup> Green Paper on Access of consumers to justice of 16 November 1993, COM(93) 576 final, p. 86, Molenberg 1995, p. 339, Hodges 2009a, p. 110, and Hodges 2013, p. 3.

<sup>39</sup> Civic Consulting & Oxford Economic, *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union. Final Report*, Berlin 2008, p. 70. See also the 2008 Report EC on the Injunctions Directive, consideration 32, and sections 4.3, 5.3, and 6.3.

<sup>40</sup> See, for instance, the annual reports of the Dutch Consumentenbond or the investors' organization VEB, available at <consumentenbond.nl/over-ons/wie-zijn-we/onze-organisatie/jaarverslag> and <veb.net/over-de-veb-menu/jaarverslagen>. See also Department for Business Innovation & Skills, Private actions in competition law: A consultation on options for reform – government response, January 2013, p. 3 and Howells 2011 p. 67.

<sup>41</sup> EC Report on the application of the Injunctions Directive, COM(2008) 756 final, consideration 32. See also Cappelletti & Garth 1978, p. 43.



might be prone to capture or a loss of independence.<sup>42</sup> They might pursue a political or ideological agenda which is not in line with the class members' interests, and (therewith) encourage or discourage particular lawsuits. This is particularly problematic when a governmental body is the – alleged – wrong-doer.

Hence, potential intermediaries might be allowed to pursue mass claims, but will not always be able or willing to do so. Nonetheless, until recently, the tone of the debate on private enforcers did not really change. In 2010, the European Commissioners Reding, Almunia and Dalli stated that adequate financial means should be available to allow citizens and businesses to have access to justice in a mass claim situation, but that contingency fees for third-party investors or lawyers should be firmly opposed as being incompatible with the European legal tradition.<sup>43</sup> The European Parliament subsequently stressed that a European framework on collective redress should not address contingency fees, as they are, by and large, unknown in Europe.<sup>44</sup> However, the European Commission did not leave the topic fully to the member states' own devices. In its 2013 Communication, it mentions that contingency fees and third-party funding could serve the objective of ensuring access to justice. As it might also inspire abusive behaviour, regulation should be carefully designed.<sup>45</sup> This was laid down in the Commission's Recommendation. Recommendation 30 states that member states should not permit contingency fees that risk creating an incentive to unnecessary litigation. However:

*'Member States that exceptionally allow for contingency fees should provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular the right to full compensation of the members of the claimant party.'*<sup>46</sup>

In addition, Recommendation 32 urges member states to:

*'ensure, that, in addition to the general principles of funding, for cases of private third party funding of compensatory collective redress, it is prohibited to base remuneration given to or interest charged by the fund provider on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties.'*

These principles are a compromise, following the diverging responses of member states to the 2011 public consultation on collective redress. These responses varied from outright rejection at one end of the spectrum to reticent hesitance at the other end. The German, British and Dutch responses illustrate this divergence. The German government mostly disapproved. It expressed the view that in order to avoid abuse, no incentives should exist to profit from litigation, directly or indirectly, or to bring a

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<sup>42</sup> Cappelletti & Garth 1978, p. 37, Schaefer 2000, p. 198; Keske, Renda & Van den Bergh 2010, p. 67-72; Issacharoff & Miller 2012, p. 58; Tzankova & Hensler 2013, p. 104, Faure & Visscher 2015, p. 83-84.

<sup>43</sup> Joint information note by Commissioners Reding, Almunia and Dalli, SEC(2010) 1192, p. 6. See, similarly, the rejection of contingency fees by the European Economic and Social Committee in its Opinion on defining the collective actions system and its role in the context of Community consumer law, 2004/C 162/01, 25.6.2008, consideration 1.6.

<sup>44</sup> European Parliament's resolution of 2 February 2012, 2011/2089(INI), consideration 20.

<sup>45</sup> Communication of 11 June 2013, COM(2013) 401 final, p. 3, 8-9, and 15.

<sup>46</sup> Recommendation of 11 June 2013, 2013/396/EU.

claim without financial risk. Furthermore, litigation costs should never disproportionately reduce a damages award.<sup>47</sup> The British government believed that entrepreneurial lawyering should be avoided, but stated that in the area of competition law it has ‘a more open mind on what might be the best solution’. It furthermore argued that litigation funding should be left to national regulation.<sup>48</sup> The Dutch government is slightly indecisive. In 2011, it considered that a claim culture should be avoided, contingency fees limited and safeguards should include protecting the quality/governance of (commercial) representative parties and their funders.<sup>49</sup> In its response to the 2013 Recommendation, it inquired whether the EC has any indication that third-party funding has created problems so far, and it questioned whether regulatory action in this field is required at this point in time.<sup>50</sup>

Regardless of the current legislative/regulatory position on contingency fees and third-party funding, in practice, entrepreneurial (mass) litigation has continued to evolve. Under the umbrella of promoting access to justice, various types of private parties have started to test the water. In some jurisdictions, the third-party funding of ‘regular’, two-party litigation is even reaching a point where it is considered ‘mainstream’. Of all of the European jurisdictions, this type of litigation funding is the most well developed in the UK; Germany is catching up with the UK, and in the Netherlands it is just getting started.<sup>51</sup> It is plausible to assume that this type of litigation funding has sprung for similar reasons as those attributed to its rise in Australia: 1) considerably high litigation costs, 2) the limited availability of contingency fee arrangements,<sup>52</sup> 3) the ‘loser pays’ costs shifting rule, and 4) decreasing legal aid funding.<sup>53</sup> The extent to which these factors have indeed influenced the emergence of entrepreneurial *mass* litigation and the specific features thereof will be addressed in Chapters 4 to 6. I will first generally introduce the types of entrepreneurial parties involved in mass litigation, and discuss their potential benefits and drawbacks.

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<sup>47</sup> Deutscher Bundestag, *Stellungnahme im Rahmen der Konsultation Kollektiver Rechtsschutz*, Drucksache 17/5956, 25.05.2011, p. 16.

<sup>48</sup> UK response to public consultation 2011, considerations 24 and 36. See also, similarly, Private Actions in Competition Law: A consultation on options for reform - Government response 2013, p. 33 and 34.

<sup>49</sup> Dutch response to public consultation 2011, p. 4.

<sup>50</sup> *Kamerstukken II* 2012/13, 22112, 1663 (Dutch response to the Recommendation and Communication).

<sup>51</sup> See sections 4.4.3, 5.4.5, and 6.4.3.

<sup>52</sup> In fact, many litigation funders are former attorneys.

<sup>53</sup> See also Morpurgo 2014, p. 21.

### 3.3 The types of entrepreneurial parties and their funding techniques

To help describe the different types of entrepreneurial parties that are currently operating on the mass litigation market, I have conducted an internet scan of the Volkswagen debacle.<sup>54</sup> Tables II and III illustrate the variety by listing (some of the) entrepreneurial parties that – aim to – pursue, in Europe, the claims of two types of harmed parties: car owners and investors.<sup>55</sup>

Entrepreneurial party and type of action (so far)	Type of – potentially – represented parties, funding and the third-parties involved
VW Emissions Action (England) (application for) GLO	British car owners. 30% contingency fee. The case is being brought by the law firms Marcus Sinclair (now removed) and Slater & Gordon (UK), funded by Therium Capital Management (US/UK)
Your Lawyers / Car Emissions Lawyers (England) Competitor of previous party, objects against GLO application	Vehicle owners, traders (and shareholders, see Table III). No win, no fee. Fee in case of success is not mentioned on the website. The vehicle is supported by the global law firm Hausfeld and Ferguson Litigation Funding.
Leigh Day (application for) separate GLO (on a different legal ground) (and test case at Motor Ombudsman)	Consumer vehicle buyers. The law firm Leigh Day acts under a conditional fee (no win, no fee), capped at no more than 30% of a class member's obtained compensation. Leigh Day has arranged ATE insurance. <sup>56</sup>
MyRight.com (Germany) Test cases in Germany and Ireland (assignments)	European car owners. 35% contingency fee. The German case is being brought by the global law firm Hausfeld and is backed by funding from Burford Capital (US/UK).
WeClaim (France) A 'class action' has been announced, further information is not available on the website	European car owners. Contingency fee in individual cases (25%). The organization states that it cooperates with third-party funders (undisclosed). If a 'class action' is launched, and funding is acquired, individuals pay 'a small percentage'. If third-party funding is not acquired, individuals have to pay to participate (amount undisclosed).

<sup>54</sup> The following websites were consulted for the car owners' claims (last checked in February 2018): <weclaim.com/actions/volkswagen-group-volkswagen>, <vwemissionsaction.com/>, <yourlawyers.co.uk/>, <caremission-lawyers.co.uk/>, <fergusonlitigationfunding.co.uk>, <leighday.co.uk/Product-safety-and-consumer-law/Consumer-law/Volkswagen-Claim>, <leighday.co.uk/Product-safety-and-consumer-law/Consumer-law/Volkswagen-FAQs>, <leighday.co.uk/News/News-2017/February-2017/Lawyers-for-Volkswagen-owners-look-for-alternative-rou>, <myright.com/>, <myright.de/abgasskandal/abg>, <hausfeld.com/news/eu/hausfeld-to-pursue-volkswagen-claims-in-germany-backed-by-financing-from-bu>, <hausfeld.com/news/eu/online-platform-launched-for-european-customer-claims-against-volkswagen>, <test.de/Abgasmanipulation-bei-VW-US-Kanzlei-startet-deutsche-Sammelklage-4982816-0/>, <volkswagenaudicclaim.nl>, <stichtingvolkswagenclaim.com>, <derclaim.nl>, <akd.nl/en/Pages/Stichting-Volkswagen-Car-Claim-announces-appointment-of-chairman-of-the-board-and-chairwoman-of-the-supervisory-board.aspx>, <verbraucherrecht.at/cms/index.php?id=2419>, <cleanvw.org/>, <emission-compensations.eu>.

For the investors' claims, the following websites were consulted (last checked in February 2018): <oberlandesgericht-braunschweig.niedersachsen.de/aktuelles/presseinformationen/kapitalanleger-musterverfahren-gegen-volkswagen-ag-verhandlungsbeginn-verschoben-160196.html>, <veb.net/dossier/Volkswagen>, <veb.net/artikel/05790/veb-holds-volkswagen-liable-for-investor-losses>, <veb.net/over-de-veb-menu/about-the-veb>, <consumentenclaim.nl/claims/dieselclaim/algemeen/dieselclaim>, <stichtingvolkswageninvestorsclaim.com/en>, <durian-pr.de/files/pi-vwshareclaim-20151209.pdf>, <volkswageninvestorsettlement.com/>, and <deminor.com/drs/en/home>

<sup>55</sup> The overview is intended as an illustration and is possibly incomplete. Please note that only entrepreneurial parties are listed here. Some consumer associations are also pursuing claims on behalf of consumers or their members; see, for instance, <facua.org/es/noticia.php?id=9193> (Spain).

<sup>56</sup> See section 5.4.3.1.

Stichting Volkswagenclaim (the Netherlands) Preliminary witness hearing (denied)	Dutch car owners. <sup>57</sup> Contingency fee (25%). A foundation has been established by Pieter Leijesen and Oscar van Oorschot, who have been involved in previous Dutch claim vehicles and collective actions.
Stichting Volkswagen Car Claim / Der-claim.nl (linked to Stichting Volkswagen Investors Claim, see Table III) (the Netherlands) Seems to aim at a (WCAM) settlement	European car owners. Website states that costs will be recovered by the foundation in the course of a settlement. In the event that such a costs agreement cannot be reached, the foundation will deduct 18% from the settlement amount. The foundation is linked to the Dutch law firm AKD, the Austrian law firm Breiteneder and the Austrian consumer association VKI.
Clean Foundation (the Netherlands) Seems to aim at a (WCAM) settlement	Non-US car owners. Website of partner Corpocon states that 'costs are covered by the Foundation', probably as part of a settlement agreement. In the case of litigation, a contingency fee is charged (15%). The foundation has been set up by a network of international attorneys (Global Justice Network) and Corpocon B.V., which has been involved in previous Dutch claim vehicles and collective actions.

Table II: Entrepreneurial mass litigation in Europe involving Volkswagen (car owners)

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<sup>57</sup> That is, the website and application form are available in Dutch only.

Entrepreneurial party and type of action (so far)	Type of – potentially – represented parties, funding and the third-parties involved
Your Lawyers / Car Emissions Lawyers (England) GLO	Shareholders (and vehicle owners and traders, see Table II). No win, no fee. Fee in case of success is not mentioned on the website. The vehicle is supported by the global law firm Hausfeld and Ferguson Litigation Funding.
Various parties have joined the KapMuG proceedings in Germany	Approx. 170 claims have been filed so far, including two claims by 278 institutional investors worldwide. Various law firms are involved, e.g.: <sup>58</sup> <ul style="list-style-type: none"> <li>- Tilp, which cooperates with a consortium of funders, including CFE (Ireland) and the US law firm Grant &amp; Eisenhofer;</li> <li>- Rotter, which cooperates with the German litigation funder AdvoFin;</li> <li>- Quinn Emanuel Urquhart &amp; Sullivan, which cooperates with Bentham Europe.</li> </ul>
VEB (the Netherlands) Has filed a representative action ( <i>collectieve actie</i> )	Dutch and foreign investors (VEB members). VEB is an association for investors – mainly Dutch – and provides support (including collective redress) and information. It charges an annual membership fee, and regularly receives a remuneration as part of a settlement agreement. <sup>59</sup>
Dieselclaim (the Netherlands) Is awaiting negotiations with VW, and has joined the KapMuG proceedings	Dutch investors. <sup>60</sup> Assignment and contingency fee (20%). Dieselclaim is part of Consumentenclaim, an association which has been involved in previous Dutch claim vehicles and collective actions.
Stichting Volkswagen Investors Claim (see also Volkswagen Car Claim) (the Netherlands). Involved in US discovery proceedings, awaiting negotiations with VW, and may join the KapMuG proceedings	Non-US investors. Website states that costs will be recovered by the foundation in the course of a settlement. In the event that such costs agreement cannot be reached, the foundation will deduct 18% from the settlement amount. The foundation is linked to the Dutch law firm AKD, the German law firm Baum Reiter, and the Austrian law firm Breiteneder, and is funded and advised by Labaton Sucharow, a US law firm.
VWShareClaim (the Netherlands) The action undertaken so far is unclear	German (?) investors. <sup>61</sup> Participants pay a one-off contribution plus a contingency fee (20-25%). The foundation has been set up by SMCO, which has been involved in previous Dutch claim vehicles and collective actions.
Volkswagen Investor Settlement Foundation (the Netherlands) Seems to aim at a (WCAM) settlement	Investors worldwide. No financial obligation, 'reimbursement of Foundation expenses and payment of legal fees for Foundation counsel will likely to be included as terms for payment out of any recovery in any Settlement'. The foundation is linked to the Dutch law firm Stibbe and the US law firm Bernstein Litowitz Berger & Grossmann.
Deminor Recovery Services (Belgium) Has filed two lawsuits in Germany, may join the KapMuG proceedings	Investors worldwide. Funding model for this case is not mentioned on the website, but Deminor normally operates under a contingency fee arrangement.

Table III: Entrepreneurial mass litigation in Europe involving Volkswagen (investors)

The financing of (all or part of) the costs in return for a share of the proceeds by a party that is otherwise unconnected with the mass damage event takes various shapes. The following types of parties and funding techniques can be distinguished.

<sup>58</sup> See the overview on <[newsroom.legial.de/fileadmin/newsroom/RM\\_03\\_2016\\_Klageflut.pdf](https://newsroom.legial.de/fileadmin/newsroom/RM_03_2016_Klageflut.pdf)>.

<sup>59</sup> See sections 6.4.4.2 and 6.5.6.2.

<sup>60</sup> That is, the website and application form are available in Dutch only.

<sup>61</sup> That is, the webpage is available in German only.

First, entrepreneurial lawyers can be involved. Contingency fee arrangements are, by and large, prohibited in the selected jurisdictions.<sup>62</sup> However, attorneys/law firms can set up a claim vehicle or be involved therein (see also hereafter) and charge an hourly or conditional fee. The overview also shows that US law firms are active on the European mass litigation market. As will be further discussed in the national chapters, such law firms might negotiate their fee to be paid out of the action's proceeds (a common fund-like technique). For this construction, the consent of individual class members is not necessarily required as the entrepreneurial party can enter into such an arrangement with the liable party as part of the settlement agreement.

Second, an entrepreneurial party might set up an ad hoc special purpose vehicle (SPV). This SPV can act as a representative organization, such as the Volkswagen Investor Settlement Foundation. In this situation, individual class members normally conclude a participation agreement with the SPV, which includes a contingency fee.<sup>63</sup> Alternatively, the SPV might enter into a settlement agreement that includes a common fund technique such as the one above. The SPV can also use the construction of (bundled) assignments to pursue the claims, as MyRight has done. In this situation, individual class members transfer their claim or right of action to the SPV, and this transfer includes a contingency (like) fee. The SPV then pursues the claim(s) in its own name.<sup>64</sup>

Third, the 'stranger' can be a third-party litigation funder, such as AdvoFin or Bentham, that cooperates with a law firm or SPV. Such funders can be subdivided into passive and active ones, although in practice the dividing line is not always easily drawn.<sup>65</sup> A passive funder's main role is to foot the bill. This construction does not necessarily include the individual class members; their contract can also be concluded with the law firm or SPV. The passive litigation funder is approached by the – potential – representative of the claimants, and if they decide to fund the action they are regularly informed but not actively involved in litigation strategies and decision-making. In essence, it is a financial services provider. Conversely, active funders are involved in litigation strategies and decision-making. Moreover, they might search for potential claims, screen cases, invest in developing the action on their own initiative, approach and inform potential claimants, and possibly initiate collective action themselves, through a SPV or in cooperation with a law firm. In that sense, they resemble the first and second type of entrepreneurial parties.

Entrepreneurial mass litigation can thus involve multi-bilateral relationships, which may comprise i) class members and attorney, ii) class members, attorney and entrepreneurial party, or iii) class members, attorney, entrepreneurial party and representative organization that cannot be identified with the entrepreneurial party. This structure obviously complicates litigation and the traditional roles that are assigned to parties in litigation. It is added to an already convoluted litigation mechanism, in which the (un)quantifiable and (un)identified class members are or are not a formal party to the procedure.<sup>66</sup> The extent to which the benefits and/or drawbacks of entrepreneurial mass litigation indeed occur is

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<sup>62</sup> See also sections 4.4.2, 5.4.3, and 6.4.2.

<sup>63</sup> See the third example in section 1.1.1.

<sup>64</sup> See the first example in section 1.1.1.

<sup>65</sup> Veljanovski 2012, p. 408.

<sup>66</sup> Cf. Voet 2015, p. 225.

closely tied to this structure, the collective redress mechanism, and the relevant rules and features of the jurisdiction in which it operates. Nevertheless, all aforementioned routes have in common that the entrepreneurial party provides or endorses a platform to assemble class members and increase leverage to pursue collective redress, in order to, eventually, share in the proceeds of the action in case of success. In the following sections, I turn to the potential effects of such an entrepreneurial objective. Where necessary, it will be mentioned to which type of entrepreneurial party it specifically applies.

### **3.4 The upside: potential benefits**

#### **3.4.1 Access to justice**

As explained in Chapter 2, ineffective access to justice has been one of the main drivers of the emergence of collective redress mechanisms. However, in turn, the operation of such mechanisms strongly depends on the activities of the authorized initiators. Given its scale and the number of parties that are potentially involved, mass litigation is expensive and risky. For this and other reasons, as discussed in section 3.2.2, potential collective actions might not (all) be undertaken by those traditionally authorized to do so. In this way, its objectives are not (fully) achieved. Enter the entrepreneurial parties. Even if the individual claims of class members are negatively valued, mass damage events are likely to constitute a (high) positive-value claim. The prospect of a potentially sizeable return on investment serves as the entrepreneurial party's incentive to undertake action. Class members (or their representative) do not have to pre-finance litigation costs nor run the risk of having to pay (a part of) the adverse costs. By taking over the funding and the risks, entrepreneurial parties facilitate or improve access to justice and, consequentially, pursue the effectivity objectives of the collective redress mechanism (compensation and deterrence).

Access to justice by way of entrepreneurial parties addresses both financial and psychological barriers to effectuate individual claims. The reduction of financial obstacles provides the lubricant for the actual operation of the collective redress mechanism. It solves class members' (or their representative's) rational apathy and risk aversion.<sup>67</sup> This can serve various types of parties: the one that lacks sufficient financial resources to engage in litigation, as well as the one that is risk averse and/or does not want to see the litigation costs on the balance sheet. Moreover, it can serve those that fear retaliation or have hopes of engaging in future business with the alleged wrongdoer. Finally, depending on the construction, the parties do not have to invest effort and time, or might appreciate more hands on deck.<sup>68</sup>

There is some empirical evidence to underpin the intuition or theory that (various types of) private litigation funding increase access to justice in the sense of litigation volume, although it very much depends on aspects such as the type of case, claimant and fee. This will be discussed in section 3.5.1.

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<sup>67</sup> Keske, Renda & Van den Bergh 2010, Visscher & Schepens 2010, Cassone & Ramello 2012, Faure 2013.

<sup>68</sup> Rowles-Davies 2014, p. 12-19.

Collective redress mechanisms also aim to address information deficiencies that obstruct access to justice (a lack of information on and knowledge of – the infringement of – their rights).<sup>69</sup> Active entrepreneurial parties can facilitate this function, as they invest time and energy in searching for and assessing potential infringements.<sup>70</sup> If an action is initiated, they provide information about the wrongful behaviour and the available remedy (join their action) through various channels, and assemble and organize class members.<sup>71</sup>

Entrepreneurial parties can also help to resolve the free-rider problem. This problem can negatively affect the operation of collective redress mechanisms.<sup>72</sup> Free riders are passive class members that do not (financially) contribute to another person's action yet do benefit from the result thereof. In the case of a successful action, the free rider might benefit from the (settlement) award. If the action is limited to active class members only, free riders might still benefit, particularly if the judgment is binding or has some effect of precedence. They might be able to use the evidence or information gathered in the proceedings at the expense of or due to the investment of others. They might also benefit from the result of an action if it applies to the general market, such as a forced price reduction.<sup>73</sup> If the other person's action is unsuccessful, the free rider will not have spent its own resources. The free-rider problem also impedes the functioning of collective redress by representative organizations. It makes it more difficult to distribute the costs among class members, which might even lead to an action not being initiated. The free-rider problem thus coincides with the funding and cost distribution of collective redress. Moreover, active claimants' support might be necessary to provide documents/evidence to underpin the action, and they might monitor the representative's actions – in particular repeat players such as institutional investors – and create its representativeness.

Free-riding behaviour can be completely eliminated under a mandatory system, where no opt-out possibility is granted, and an opt-out mechanism is often considered to be the second best option to reduce free riders as, in light of rational apathy, few individuals will opt out.<sup>74</sup> This can be illustrated with a quote from Calabresi:

*'When the matter [mass damage event] was brought to my attention, with the right to opt out, I didn't think for one moment of opting out and bringing my own suit, for the same reasons that I previously had no knowledge or interest in the wrong that had been done me.'*<sup>75</sup>

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<sup>69</sup> See section 2.3.

<sup>70</sup> See also section 3.4.3.

<sup>71</sup> Bentham Europe 2014, p. 4.

<sup>72</sup> Olson 1965, Stigler 1974, Keske, Renda & Van den Bergh 2010, p. 60, Tzankova 2011, Van den Bergh 2013, Visser & Faure 2015.

<sup>73</sup> Van den Bergh 2013, p. 25.

<sup>74</sup> Rosenberg 2002, Eisenberg & Miller 2004, Keske, Renda & Van den Bergh 2010, p. 60-63, Issacharoff & Miller 2012, p. 64-65, Faure 2013, p. 49, Van den Bergh 2013, p. 21.

<sup>75</sup> Calabresi 2012, p. 10.



However, an opt-out mechanism is not always available or politically viable, and the aforementioned reasoning does not apply, or applies to a lesser extent, to positive-value claims.<sup>76</sup> Furthermore, an opt-out mechanism does not necessarily solve the funding/costs distribution problem. The cure that entrepreneurial parties can provide is twofold. First, they reduce the (financial) threshold for individuals to participate, and therewith incentivize them to do so rather than await the action of others. Second, even when the contingency fee provides an insufficient incentive to participate, the entrepreneurial party might create or engage in a remuneration construction that does not require a contractual relationship with class members, such as the common fund.<sup>77</sup> In this way, they cure the free-rider problem, thereby restoring the functioning of the collective redress device and improving the objective of deterrence.

### 3.4.2 Competition

Incentives to bring claims and therewith gain a profit have created a ‘vibrant group litigation sector’ in the USA. A successful Australian third-party funder has encouraged newcomers to the market which, in turn, has changed the Australian class action landscape: in the period 2014-2017, other law firms were involved in 77% of all filed class actions.<sup>78</sup>

If entrepreneurial parties are allowed to operate on the legal services market, it adds various other key players (third-party funders, attorneys, SPVs). Depending on the specific market they serve,<sup>79</sup> entrepreneurial parties might compete not only with each other, but also with the traditional legal services providers such as attorneys that operate on hourly fees and the (semi-)public/private organizations that are already allowed to initiate collective redress, and with funding techniques such as legal expenses insurance.<sup>80</sup> In such a competitive market, aggrieved parties have more choice, might get a better deal, and market failures might be remedied. Such a market is welcomed by law and economics scholars. They consider a monopoly by (semi-)public/private organizations, assisted by attorneys that operate on an hourly tariff, to be problematic.<sup>81</sup> Particularly, if it is questionable whether such bodies also pursue their own interest due to political motives or opportunistic reasons. The assumption that (semi-)public bodies are ‘special human beings entirely unmoved by individual utility’, is a peculiar and unproven hypothesis.<sup>82</sup> In the words of Stürner:

*‘Even non-profit organizations live on earth and are not angels’.*<sup>83</sup>

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<sup>76</sup> See, for instance, Coffee 2008, p. 416.

<sup>77</sup> See section 3.2.1.

<sup>78</sup> Marcus 2013, p. 163, Waye & Morabito 2017, p. 159, Morabito 2017, p. 35. See also section 3.2.1.

<sup>79</sup> See also section 3.5.3.

<sup>80</sup> Faure 2013, p. 50; and Keske, Renda & Van den Bergh 2010, p. 67 ff.

<sup>81</sup> Keske, Renda & Van den Bergh 2010, p. 71, Faure 2013, p. 47, 50, Marcus 2013, p. 159, 163, Van den Bergh 2013, p. 26 ff.

<sup>82</sup> Cassone & Ramello 2012. See also section 3.2.2.

<sup>83</sup> Stürner 2012, p. 84.

Entrepreneurial parties diversify the supply of funding mechanisms that are available to class members and can provide a safeguard against (political) capture as it is driven by different forces.<sup>84</sup> A competitive market may enhance the objectives of compensation (a 'better deal' by way of price competition), deterrence (the better detection of infringements) and efficiency ('better litigation' by way of quality competition – see also sections 3.4.3 and 3.4.4).

As entrepreneurial parties enhance the market for legal services, competition among them and with attorneys that operate on hourly fees will increase as well. If the market is well established and freely competitive, it should have a downward pressure on the fees and/or percentages charged.<sup>85</sup> An illustrative example of such an effect is the abandonment of solicitors' monopoly in specific legal services in the late 1980s in England and Wales, which made the prices thereof drop by 20 to 28%.<sup>86</sup> Further measures to abolish the complete monopoly on legal representation by solicitors and barristers are also said to have encouraged competition within the legal services market, improved efficiency, and reduced prices and decreased costs of legal services.<sup>87</sup> Opposing views to this effect of competition have been expressed as well. For instance, in 2003, Brickman argued that the contingency fee market in personal injury cases is not price competitive. He links this to, inter alia, the entry barriers and the prohibition of the claim transfer of personal injury claims.<sup>88</sup> Furthermore, even with a variety of (entrepreneurial) parties that operate in the collective redress market, it has a high degree of specialisation and concentration of legal services. The elements to generate perfect competition and create competitive rates might not be present.<sup>89</sup>

It should also be noted that it remains unclear to what extent class members can compare the return value (the quality of services) for advertised percentages. This depends on their capacity/capability and the search costs – see also hereafter on 'exit strategy'.<sup>90</sup> Whether price competition takes place also depends on the specific features of the collective redress mechanism. For instance, Hensler states that for securities class actions price competition has emerged from i) auctioning class actions to the highest bidder (the law firm with the lowest percentage) and ii) a provision in the 1995 Private Securities Litigation Reform Act (PSLRA), pursuant to which the choice of lead plaintiff is based on the amount in dispute, which has incentivized law firms to compete (concerning prices) for those with the largest stake in such actions: institutional investors.<sup>91</sup> Furthermore, the presence of competing parties, in particular those that object to (the lead counsel's fees in) class action settlements is relevant for the fees *awarded* in class actions. Eisenberg, Miller & Germano have found that:

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<sup>84</sup> Coffee 2015, p. 5-7, De Mot, Faure & Visscher 2017, p. 51.

<sup>85</sup> Schaefer 2000, p. 194, Silver 2002, p. 2089, Abrams & Chen 2013, p. 1079.

<sup>86</sup> Paterson e.a. 1988, p. 363, with further references. See also section 5.2.2.

<sup>87</sup> Department for Constitutional Affairs, *The Future of Legal Services: Putting Consumers First*, CM 6679, October 2005.

<sup>88</sup> Brickman 2003.

<sup>89</sup> Waye & Morabito 2017, p. 164, Hensler 2010, p. 152-153, Schaefer 2000, p. 194.

<sup>90</sup> On search costs, see also section 3.4.5.

<sup>91</sup> Hensler 2010, p. 161, referring to an American Bar Association report that states that price is a key factor for institutional investors in the selection of law firm. See also Perino 2006.

*(...) cases with no objectors obtained a statistically significantly higher fee percentage on average than cases with objectors ( $p < 0.01$ ), but a lower average fee award.<sup>92</sup>*

Another positive effect of a competitive market is that a class member with a strong claim should be readily able to find someone to facilitate the pursuit of the claim,<sup>93</sup> and those that are not satisfied with the choices of one can turn to another. Therewith, class members have an ‘exit strategy’ and gain control, which diminishes principal-agent problems (a misalignment of the interests of the initiator of the action and class members).<sup>94</sup> Proof thereof is provided by Coffee, who describes how the aforementioned change in the PSLRA led to increasing exits (opt outs) of institutional investors, which stimulated competition in the sense of quality improvement (or less charges) of the entrepreneurial lawyers.<sup>95</sup>

### **3.4.3 Quality of claims**

One of the main said risks of entrepreneurial parties is that they stimulate frivolous litigation. This might refer to a variety of questionable litigation, such as speculative, nuisance, or abusive suits. Opponents claim, for instance, that ‘the occasional jackpot’ encourages entrepreneurial parties with a substantial case portfolio to enter into speculative litigation (cases with an expected outcome that is marginally less certain than that of other cases).<sup>96</sup> Furthermore, claimants have unique information about the quality of their claim. This information asymmetry might lead to adverse selection: only claims with weak merits are selected to be transferred.<sup>97</sup> It is questionable to what extent such critique is correct. Entrepreneurial parties might equally increase the quality of cases being litigated and thereby benefit the objectives of compensation (fair compensation), deterrence (reducing frivolous claims and thereby overdeterrence) and efficiency (no excessive, frivolous litigation). The characteristic of improving the quality of claims will be discussed in this section. The risk of inciting frivolous litigation will be further discussed in section 3.5.4.

The increase in quality essentially results from the assumption that entrepreneurial parties do not like to lose money and, thus, will screen a case thoroughly – for which they might have the necessary expertise (see section 3.4.4) – and will only bring those that have a relatively high chance of success. Such an intake and due diligence assessment – and the monitoring of the case during proceedings – improves the quality of claims that are (continued to be) pursued. There is some empirical evidence that these assumptions are tenable, although most studies have focused on regular litigation.<sup>98</sup> However, since the costs and risks of mass litigation are significantly higher, it is plausible that this line of reasoning applies to entrepreneurial *mass* litigation as well.

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<sup>92</sup> Eisenberg, Miller & Germano 2017, p. 959-960.

<sup>93</sup> Friel, Barnes & Bird 2016, p. 25.

<sup>94</sup> Keske, Renda & Van den Bergh 2010, p. 71, Van den Bergh 2013, p. 30. On the theory, see sections 3.4.5 and 3.5.5.

<sup>95</sup> Coffee 2008.

<sup>96</sup> Helland & Tabarrok 2003, p. 518, referring to Bernstein 1996.

<sup>97</sup> Abramowicz 2005, p. 743, referring to Akerlof’s seminal paper (1970) on the market for lemons.

<sup>98</sup> See, for instance, the overview in Fenn & Rickman 2010, p. 142 ff.

In 2003, Helland and Taborrok conducted an empirical study on US attorneys' remuneration in personal injury cases, comparing the impact of contingency fees and hourly fee arrangements, inter alia, on the quality of cases. They convincingly found that limits on contingency fees led to an increase in the drop rate, that is, that more claimants initiated proceedings but later on dropped their claim. This drop rate, according to Helland and Taborrok, signals insufficient case screening. They attribute the increase in the drop rate to the lack of incentive for an 'hourly fee attorney' to not bring a claim with a low chance of success. This indicates, they conclude, that limits on contingency fees reduce legal quality, or, conversely, that contingency fees increase legal quality.<sup>99</sup> Furthermore, the screening of cases signals the quality of a claim to the potential claimant. If litigation funding is rejected due to a lack of merits, this claimant might drop the case.<sup>100</sup> The causality between the drop rate and screening has been contested by Fenn and Rickman. They argue that greater drops could equally imply that attorneys take their monitoring role more seriously once the case is in motion and information is produced.<sup>101</sup> Nevertheless, in their review of the theoretical and empirical literature on this topic (based on US and UK data), Fenn and Rickman also conclude that lawyers who bear some risk through contingency fees are likely to act as gatekeepers and screen cases more carefully than those who do not.<sup>102</sup>

Accurately assessing claim value (its chance of success) can be challenging, however. The case studies of Hensler et al. show that it is complex and in the eye of the beholder.<sup>103</sup> The case studies involved ten different class action lawsuits and, inter alia, assessed the underlying claims and the presentation thereof by both parties. According to Hensler:

*To the RAND research team, it was unclear which, if any, of the ten class actions were non-meritorious and which were worthy of litigation. In each lawsuit, viewed from one perspective, the claims appeared meritorious and the behavior of the defendant blameworthy; viewed from another perspective, the claims appeared trivial or even trumped up, and the defendant's behavior seemed proper. Moreover, we have found that different readers' assessments of the merits of the cases often are diametrically opposed.*<sup>104</sup>

The screening process might be (further) improved if a third-party litigation funder is involved. Litigation funders often previously worked as attorneys or they intensively cooperate with attorneys. They are said to be 'good funders [as they] have the ability to assess the value of suits.'<sup>105</sup> Similarly, in 2016, an international law firm noted that:

*'the involvement of a funder adds an additional layer of diligence at an early stage of the process, leading to greater rigour in risk and cost-benefit assessments.'*<sup>106</sup>

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<sup>99</sup> Helland & Tabarrok 2003.

<sup>100</sup> Helland & Tabarrok 2003, p. 519, with further references.

<sup>101</sup> Fenn & Rickman 2010, p. 143.

<sup>102</sup> Fenn & Rickman 2010, p. 143, with further references. See, similarly, Faure & Hartlief 2012, p. 160 ff.

<sup>103</sup> Hensler 2010, describing empirical studies concluded by her RAND colleagues and herself.

<sup>104</sup> Hensler 2001. The case studies are elaborately discussed in Hensler e.a. 2000.

<sup>105</sup> Issacharoff & Miller 2012, p. 55.

<sup>106</sup> Freshfields Bruckhaus Deringer, as quoted by Friel & Barnes 2016, p. 5.

The study by Veljanovski addresses the third-party litigation funding of regular and mass litigation. Based on documentation provided by and interviews with third-party litigation funders, Veljanovski found that only a small percentage of cases are selected for funding and that there is a considerable process of filtering out unmeritorious claims:

*[t]he selection of cases involves considerable due diligence from the management team, their legal advisers, and, often, forensic accountants. Funders with a private equity background, e.g., Calunius Capital and Therium, used financial modelling to select cases. Others used risk assessments, while others implemented more informal methods. Most of this time and effort was upfront and relatively fixed, regardless of the size of the claim.<sup>107</sup>*

A final aspect is the entrepreneurial party's investigation of the opponent's financial means and/or insurance. Whether an award or settlement can be recovered in the case of success is an important criterion for funding or pursuing a claim.<sup>108</sup> This aspect of entrepreneurial mass litigation is mainly a funder's interest and is subject to the risk of imperfect information and an impossibility to predict the future (assets). However, it adds to the quality of a claim as it avoids ineffective litigation. On the other hand, this neglects certain objectives such as developing the law and providing restorative justice. Furthermore, the asset assessment might also lead to adverse selection. This risk will be discussed in section 3.5.3.

#### **3.4.4 (E)quality of arms**

As the stakes in mass litigation are high, allegedly liable parties might just take a deep breath, dip into their deep pockets, and engage in strategical conduct to subdue, intimidate or outspend claimants.<sup>109</sup> They might refrain from doing so when they are facing a financially sound and professionally equipped opponent, not someone that foregoes litigation due to financial or psychological restrictions. Not only does this increase the quality of litigation, but it also levels the playing field between both opponents, thereby creating equality of arms. The availability of funding furthermore adds muscle to the already countervailing power of a class that challenges a powerful defendant. This potential beneficial characteristic of entrepreneurial mass litigation does not only apply to court litigation, but to settlement negotiations as well. Veljanovski notes that a defendant might be more willing to settle as it realizes that the claimants, backed by a litigation funder, can bear the financial risk of taking a case to court.<sup>110</sup> Hence, the professionalism of entrepreneurial parties might enhance the objective of efficiency in various ways.

This benefit particularly concerns repeat players – as opposed to one-shotters, those that only occasionally engage in litigation. The professionalism of repeat players in general was first recognized by Galanter in 1974, who summed up that:

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<sup>107</sup> Veljanovski 2012, p. 420, 439-441. See similarly, for instance, Rowles-Davies 2014, p. 108-111, 116-117, Bentham Europe 2014, p. 4, and sections 3.4.1 and 3.5.1.

<sup>108</sup> Veljanovski 2012, p. 420, Pirozzolo 2014, p. 164, Rowles-Davies 2014, p. 112.

<sup>109</sup> Yeazell 2004, p. 955. For consumers, various studies report their feeling of inferiority to businesses, which causes trust issues in legal proceedings; see Creutzfeldt 2013, p.235.

<sup>110</sup> Veljanovski 2012, p. 439.

- 1) repeat players' litigation experience creates 'advanced intelligence' to structure their next transaction and build a record;
- 2) repeat players have expertise, access to specialists and enjoy economies of scale;
- 3) they have the opportunity to develop relationships with decision-makers such as courts;
- 4) are incentivized to establish and maintain credibility and a 'bargaining reputation';
- 5) are able to (adopt strategies to) spread litigation risks over more cases;
- 6) utilize resources to influence rule-making (e.g. lobbying);
- 7) have a long-term vision and therefore a concern for the rules that govern future cases of the same kind; 'anything that will favourably influence the outcome of future cases is a worthwhile result', which might lead them to, for instance, select those cases which are likely to produce favourable rules;
- 8) or those cases that make a tangible difference; and
- 9) invest the matching resources to secure such favourable outcomes.<sup>111</sup>

Indeed, many entrepreneurial parties are repeat players and are said to have a team and network of experts to help build the case and pursue the claim. In case of cooperation with an attorney they are an extra key player that manages the litigation (budget), assists or instructs lawyers, and assists and informs claimants.<sup>112</sup> Yeazell notes that entrepreneurial lawyering has developed the American plaintiff bar from one that would be 'systematically outgunned' by the defence bar, to an equally capitalized and skilled plaintiff bar.<sup>113</sup> A similar development is observed in Australia. As mentioned in sections 3.2.1 and 3.4.2, two law firms, often backed by litigation funders, have long been the main suppliers of class actions. This is gradually changing, however, as between 2014 to 2017, other law firms were involved in 77% of all filed class actions.<sup>114</sup> Although Morabito found that 62% of all the law firms involved had no prior experience in dealing with such actions, some of them only act in class actions supported by litigation funders and Australia's main litigation funder (IMF Bentham, active in class actions since 2001) remains the largest supporter of class actions (one out of every three funded class actions).<sup>115</sup>

### **3.4.5 Alignment of interests**

An objection that is often raised against entrepreneurial parties is that they pursue their own interests rather than those of the class members. The principal-agent theory, which will be discussed in this section, argues that the problem of conflicting interests can be solved by way of a result-based remuneration as it aligns the interests of both parties. The potential insufficiency of this alignment will be discussed in section 3.5.5.

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<sup>111</sup> Galanter 1974, p. 98-103.

<sup>112</sup> Bentham Europe 2014 (on the Australian experiences), p. 4.

<sup>113</sup> Yeazell 2004, p. 955 and 958.

<sup>114</sup> Morabito 2017, p. 35. See also section 3.5.1.

<sup>115</sup> Morabito 2017, p. 33-36.

An agency relationship is one in which the principal benefits from the performance of a task by the agent in exchange for payment, such as an aggrieved individual that engages an attorney.<sup>116</sup> The principal-agent theory is based on the assumption that the principal and agent both pursue different interests, and that the principal does not have the information to observe, assess and control the expertise, efforts and goals of the agent (information asymmetry).<sup>117</sup> If the interests of both are not aligned and the principal lacks certain information, the agent may have an incentive to act inappropriately, that is, in its own interest instead of that of the principal. The agency theory focuses on determining the most efficient contract governing the principal-agent relationship.<sup>118</sup> One of the options to reduce the costs that ensue from the information asymmetry (the costs of searching/assessing/controlling the agent) is to make the agent's remuneration dependent on the output of its efforts, such as a contingency fee arrangement.<sup>119</sup> The agent shares in the profits that the principal wants to have maximized. When effort is unobservable, such an outcome-based contract is said to be the efficient approach to avoid a conflict of interests.<sup>120</sup>

Mass litigation deviates from the classical principal-agent situation since it concerns various principals instead of one, whose preferences might be heterogeneous. When the interests of the aggrieved individuals are aligned, the theory applies one on one.<sup>121</sup> Furthermore, according to Posner, even if the complications that arise from a heterogeneous group of principals are taken into account, the basic lessons of the agency theory still hold true.<sup>122</sup>

Pursuing their claim against minimal costs is the main interest of class members. Generally, they are unable to directly observe and assess the representative's level of effort, although it depends on the situation (see hereafter). Class members might lack both factual and legal knowledge: is the claim viable, is the legal assistance necessary, are there cheaper alternatives to pursue the claim, is the representative a professional, what are the efforts it needs to undertake to pursue the claim, what are the costs thereof, and so on.<sup>123</sup> Furthermore, if the action does not lead to (satisfactory) compensation, is this because the claim was unmeritorious or because the agent did not make enough of an effort? Is the amount of the received compensation equal to its actual worth minus the actual costs of pursuing it, or is the organization's portion too large?

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<sup>116</sup> See, for instance, Rickman 1994, p. 35, and Posner 2000, p. 1.

<sup>117</sup> Posner 2000, p. 4, Kreps 1990 (Chapter sixteen: Moral hazard and incentives), and Mas-Colell & Whinston 1995, p. 436-510. The information asymmetry can be subdivided into the problem of moral hazard and of adverse selection. Moral hazard concerns the risk that the agent engages in little effort (shirking) since his actions are not observed by the principal, for which the principal will bear the costs or burdens. Adverse selection takes place if the agent's decisions depend on some unobservable characteristics that only he can observe, and might adversely affect the principal.

<sup>118</sup> Eisenhardt 1989, p. 58.

<sup>119</sup> Eisenhardt 1989, p. 61; Posner 2000, p. 5; Ulen 2011, p. 192.

<sup>120</sup> Rickman 1994, p. 36.

<sup>121</sup> Posner 2000, p. 6.

<sup>122</sup> Posner 2000, p. 6. See also Coffee 1987, Keske, Renda & Van den Bergh 2010, and Faure & Visscher 2015.

<sup>123</sup> Visscher 2013.

If the agent is an attorney that is paid by the hour, he has two types of interest. The attorney's main interest is to maximize his remuneration. According to the agency theory and due to the class members' lack of information, the attorney might perform his task against a minimum of effort. Hourly fees tend to induce shirking (the agent engages in little effort), billing too many hours, taking unnecessary actions in order to write bills or giving a biased assessment of the quality of the claim.<sup>124</sup> Obviously, it is also the attorney's job to protect the principals' interests. In that protection, he is bound by ethical and professional codes, and is subject to general professional liability rules. However, merely losing a case does not constitute culpability. Hence, reputational risks and personal characteristics aside, the attorney does not bear the risk of an outcome that is unfortunate for class members.

To solve this agency problem, the class members can invest in monitoring costs to observe the agent's behaviour. The extent to which (perfect) monitoring can take place depends on the type of class member, representative, case, and the design of the collective redress mechanism, such as additional monitoring by the court. For instance, in the case of negative-value claims class members' interest might be too low to warrant incurring monitoring costs, or they might be incentivized to freeride if it is difficult to spread the costs among the class members. Furthermore, even if monitoring is possible, how do the class members assess the accounts as stated by the attorney on the time and effort spent? If the principals cannot (fully) observe the agent's conduct, another solution is to better align the interests by way of an outcome-based remuneration. This provides the agent with the incentive to obtain optimal compensation.<sup>125</sup> Both the entrepreneurial party and class members now have the same interest: as high proceeds (compensation or a percentage thereof) as possible, in a speedy, inexpensive and efficient way. If the entrepreneurial party is an additional party, such as a third-party funder, it can also monitor the attorney's or representative's actions.<sup>126</sup>

### **3.5 The dark side of the coin: potential risks**

#### **3.5.1 Claim culture**

In this first of five sections that discuss the potential risks of entrepreneurial mass litigation, I will discuss the risk of creating or sustaining a compensation culture, also known as litigation or claim culture.<sup>127</sup> This risk can be considered the opposite side of the benefit that entrepreneurial parties facilitate access to justice and increase the quality of claims.<sup>128</sup>

Urban legends regarding the McCoffee spill case and a microwaved poodle aside, it is cases such as the following that have incited opposition against (entrepreneurial) mass litigation:

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<sup>124</sup> Rickman 1994, Emons 2000, Visscher & Schepens 2010, Deffains & Langlais 2011; and Keske, Renda & Van den Bergh 2011, p. 65, all with further references.

<sup>125</sup> See the literature mentioned in the previous footnote. See also Ulen 2011, p. 194.

<sup>126</sup> Issacharoff 2014, p. 585.

<sup>127</sup> Some parts of this section are based on Tillema 2017.

<sup>128</sup> See sections 3.4.1 and 3.4.3.



*‘Recently, Ferrero U.S.A. settled lawsuits brought by two moms who said they were deceived by health claims made on jars of the chocolate hazelnut spread Nutella. Yes, if you bought Nutella thinking it was spinach in a jar – actually even if you bought it because you find it delicious – you are a winner.’*<sup>129</sup>

European opponents label cases such as these as ‘American situations’; an ominous motto to oppose the introduction of certain American elements into European legal systems.<sup>130</sup> One of the situations the expression refers to is the alleged American compensation culture, which is boosted by entrepreneurial parties. Not uncommonly, however, the opponents fail to underpin such statement or omit additional facts. Furthermore, such opposition renders the question of how to label, for instance, political or regulatory activities aimed at banning any reference to meat on the packaging of vegetarian meat replacements.<sup>131</sup> European situations?

Obviously, beneath the surface of empty rhetoric might lie serious issues. Compensation culture, however, is a rather ambiguous phenomenon.<sup>132</sup> The relevance of the question of whether or not entrepreneurial parties increase mass litigation is not always clear. Posing such a question suggests a vision on the desirable level of litigation: when is access to justice excessive? The main concern seems to be that entrepreneurial parties increase the number of claims and the amount of damages. The policy documents as described in Chapter 2 also focus on the concept of fairness, that is, litigation is excessive if the action is abusive or unethical, such as pursuing frivolous claims. These effects might increase courts’ workload (inefficiency), deteriorate a jurisdiction’s business climate, reduce trust in its judicial and legal system, and impose disproportionate costs on industry (overdeterrence and unfair compensation): the fear of litigation might lead to defensive behaviour, high insurance costs, harm competitive behaviour and/or negatively impact innovation. Furthermore, the costs of litigation and/or compensation might be redistributed.<sup>133</sup> In the following sub-section, I will discuss the element of excessive access to justice. Potential abusive behaviour will be discussed as a separate risk, in section 3.5.4.

In general, ‘[b]asic economics dictates that if the costs of litigation are reduced, there will be more of it.’<sup>134</sup> Entrepreneurial parties do not necessarily reduce costs, but facilitate access to justice by taking over the pre-financing of costs and the cost risk.<sup>135</sup> This reduces the threshold for a claimant to pursue his claim. This is why, generally, contingency fees are said to increase litigation.<sup>136</sup> Logic dictates that

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<sup>129</sup> D. Segal, ‘A Rising Tide Against Class-Action Suits’, *New York Times* 6 May 2012, as quoted by Marcus 2013, p. 170.

<sup>130</sup> See, for instance, *Kamerstukken II* 2011/12, 33 126, 6, some contributions in Hess e.a. 2011, Wernicke 2013, and [justicenotprofit.co.uk](http://justicenotprofit.co.uk).

<sup>131</sup> See [zeit.de/gesellschaft/zeitgeschehen/2016-12/agrarminister-christian-schmidt-kennzeichnung-vegetarische-produkte](http://zeit.de/gesellschaft/zeitgeschehen/2016-12/agrarminister-christian-schmidt-kennzeichnung-vegetarische-produkte), *Kamerstukken II* 2016/17, 2017Z00040 (questions of two members of parliament) and [nvwa.nl/nieuws-en-media/nvwa-in-de-media/eerdere-persreacties/project-misleidende-etikettering](http://nvwa.nl/nieuws-en-media/nvwa-in-de-media/eerdere-persreacties/project-misleidende-etikettering).

<sup>132</sup> See, for instance, Bauw e.a. 1999, Williams 2005, Hand 2010, and Faure & Hartlief 2012.

<sup>133</sup> See, for instance, Bauw e.a. 1999 (Chapters 3 and 4), Beisner, Miller & Rubin 2009, U.S. Chamber Institute for Legal Reform 2013, Van den Bergh 2013, p. 17, UK Response to EC Public Consultation on Collective Redress 2011, under 13.

<sup>134</sup> Veljanovski 2012, p. 438.

<sup>135</sup> See section 3.4.1.

<sup>136</sup> Visscher & Schepens 2010, p. 17.

the same applies to entrepreneurial parties in *mass* litigation, where the potential to increase the volume of litigation is amplified by the fact that entrepreneurial parties might actively search for claims, raise publicity, and approach class members.<sup>137</sup> On the other hand, the boost in litigation might be mitigated by the fact that entrepreneurial parties will only take on quality claims,<sup>138</sup> rather settle than litigate,<sup>139</sup> and pursue only those claims of a particular type and value.<sup>140</sup> Moreover, an increase in mass litigation might go hand in hand with a decrease in regular litigation.<sup>141</sup> An increase in mass litigation might furthermore be unrelated to the activity of entrepreneurs but caused by other factors, such as a financial scandal or crisis.

In short, the extent to which entrepreneurial parties indeed increase (mass) litigation depends on several variables and is difficult to (in)validate. According to law and economics scholars, the overall result cannot be predicted theoretically.<sup>142</sup> Empirical evidence of the effect of entrepreneurial funding on litigation volume is scarce.<sup>143</sup> Fenn & Rickman attribute this scarcity to the difficulty of gaining (access to) sufficiently detailed data and the lack of variation in funding methods in order to make a diligent comparison.<sup>144</sup> For mass litigation, an additional reason is the lack of a sufficiently large number of cases.<sup>145</sup> Even in the USA, real evidence on, inter alia, the volume of litigation is scarce,<sup>146</sup> but some data is available. For instance, in 2004, Galanter showed the rise of class action filings as of the 1990s (particularly tort and securities class actions) as opposed to the ‘vanishing trial’: the decline in the rate and number of regular civil trials in the US.<sup>147</sup> The study concerned cases in both state and federal courts. Galanter attributes the said increase to changing strategies by defendants that started using the class action as an instrument to manage the risk of multiple claims. Moreover, he connects the rise of class action filings to the decline in regular trials:

*‘when lawyers undertake to bundle claims in “high trial” areas like torts (...) into class actions, we might expect fewer trials. Conversely, the withering of civil rights class actions may be reflected in the great surge of filings and trials in individual civil rights cases.’<sup>148</sup>*

In his reflection on Galanter’s data, Burbank notes, however, that the inference is premature and should exclude, for instance, those class actions that would not have been litigated but for the class

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<sup>137</sup> Veljanovski 2012, p. 440. See also section 3.4.1.

<sup>138</sup> As discussed in section 3.4.3, and hereafter in section 3.5.4.

<sup>139</sup> As discussed in section 3.4.4, and hereafter in section 3.5.5.

<sup>140</sup> See hereafter in section 3.5.3.

<sup>141</sup> See Galanter 2004, discussed hereafter.

<sup>142</sup> Visscher & Schepens 2010, p. 18, Faure, Fernhout & Philipsen 2010, p. 41, and De Mot, Faure & Visscher 2017, p. 46. See, for instance, Fenn & Rickman 2010, Barker 2012 and Lysaught & Scott Hazelgrove 2012.

<sup>143</sup> Cf. Faure, Fernhout & Philipsen 2010, p. 41, Fenn & Rickman 2010, p. 136.

<sup>144</sup> Fenn & Rickman 2010, p. 136-137.

<sup>145</sup> Hodges 2010, p. 709. On the reliability of US courts’ data, see also Burbank 2004, p. 578 ff.

<sup>146</sup> Pace 2007, p. 46-48.

<sup>147</sup> Galanter 2004, p. 485 ff. On data before and during the 1990s, see Hensler 2001.

<sup>148</sup> Galanter 2004, p. 487-488.

action (e.g. negative-value claims) and those non-class action mass settlements that did not necessarily lower the trial rate.<sup>149</sup> Another empirical study that has provided data on the volume and growth of class actions is that by Pace et al. (2007) on insurance class actions.<sup>150</sup> The study reaches a similar conclusion as Galanter's, that there has been a steep increase in (this specific type of) class actions as of 1993. However, the researchers also identify a considerable drop in the increase as of 2002. In contrast, Willging and Lee – examining data on federal class actions in the period of 2001-2006 – have shown that (these types of) actions have continued to rise considerably.<sup>151</sup>

Hence, general predictions and statements on litigation rates cannot easily be made. More importantly, none of these studies specifically address the effect of attorney remuneration on litigation volume. As for regular litigation, Yeazell has linked this question to developments in (privatized) pre-trial investigation and, to meet the high costs thereof, the restructuring of the legal profession. For instance, he describes how practice groups have emerged (lawyers practising in groups rather than alone), building portfolios and utilizing part of their income from a range of work to invest in larger, less predictable cases. In addition, an active and well-functioning referral market has emerged:

*'with the less-well-capitalized practices getting referrals of cases too small for the big fish and the high-end practice getting referrals of large-value, large-investment cases from small practices.'*<sup>152</sup>

Over decades, such financing and strategy practices have developed the plaintiff bar from one that would be 'systematically outgunned' by the defence bar, to an equally capitalized and skilled plaintiff bar.<sup>153</sup> The effect thereof, according to Yeazell, is that fewer cases go to trial and they are settled instead:

*'In a world in which the plaintiffs lawyer had made virtually no investment in pretrial investigation or discovery (perhaps because he or she could not afford any), trial, if the lawyer could hang on that long, was a rational choice – there was a very small chance of winning, but there was little chance of winning without it. Further, there was little need for continuing investment and the continuing reevaluation that decision entails. In a world of significant pretrial investment – continuing investment made by both sides – settlement looks different.'*<sup>154</sup>

There is some Australian evidence available on the effects of third-party funding on the volume of class actions. Based on empirical research by Morabito on federal class actions in the period 1992-2009 and backed by other data, Wayne and Morabito describe how the involvement of third-party litigation funding has increased significantly in the past decade. Nonetheless, the overall number of class actions has

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<sup>149</sup> Burbank 2004, p. 583.

<sup>150</sup> As summarized by Pace 2007, p. 48 ff.

<sup>151</sup> Pace 2007, p. 50, referring to Lee & Willging 2008.

<sup>152</sup> Yeazell 2004, p. 958.

<sup>153</sup> Yeazell 2004, p. 955 and 958.

<sup>154</sup> Yeazell 2004, p. 959.

only slightly increased.<sup>155</sup> Wayne and Morabito explain how, around 2007, the number of class actions had started to decline as they had become too expensive and risky for law firms – which are not allowed to engage in contingency fees and have limited access to capital markets. Backed by litigation funders, however, their willingness to initiate and engage in class actions returned.<sup>156</sup> Wayne and Morabito's conclusion is supported by another empirical study. In 2013, Abrams and Chen combined data from Australia's largest litigation funder, IMF, with published case law. Although their methodology might require caution as to the results,<sup>157</sup> they found no statistically significant effect of litigation funding on the volume of class actions.<sup>158</sup> Finally, in 2017, Morabito provided some first evidence that refuted the prediction that the number of class actions would increase after introducing a common fund scheme in federal class actions.<sup>159</sup>

Finally, as to the effect of attorneys' fees on the amount of recoveries, the empirical studies of Eisenberg et al. are relevant. The researchers have conducted three empirical studies on attorneys' fees in American class actions in federal and state courts. None of the studies found robust evidence that (the mean or median) recovery for plaintiffs has increased over time (1993-2013).<sup>160</sup>

### 3.5.2 Inefficient competition

As discussed in section 3.4.2, the potentially high return on investment in mass litigation might increase competition between (entrepreneurial) parties. Such a surge might also produce the adverse effect of inefficient competition. Competing (entrepreneurial) parties will try to attract class members through various channels.<sup>161</sup> This might result in confused individuals as to what party will better serve their interests, an information asymmetry that is detrimental to consumers in particular.<sup>162</sup> Moreover, the potentially ensuing separate collective actions, whether simultaneously or sequentially filed, might fully or partially overlap if the initiators invoke different legal grounds, seek different types of relief, or represent a specific sub-class only.<sup>163</sup> If their consent is not required, class members might be included in more than one action, or be 'bombarded with notices from the multiple suits'.<sup>164</sup> Such a multiplicity of proceedings obviously negatively affects the objective of efficiency as it leads to more cases, increased costs for parties and society, possibly inconsistent adjudication and finality problems. This inefficiency problem of competing actions will be discussed in this section. Competing actions might also result in inefficient settlements (reverse auction, collusive settlements). The latter risk is related

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<sup>155</sup> Morabito found that in the period 2009-2014, 15.8 class actions were filed per year, and 14.7 per year in the preceding 17 years; Wayne & Morabito 2017, p. 158.

<sup>156</sup> Wayne & Morabito 2017, p. 156 ff.

<sup>157</sup> Veljanovski 2012, p. 440, referring to a selection bias.

<sup>158</sup> Abrams & Chen 2013, p. 1102.

<sup>159</sup> Morabito 2017, p. 40. See also sections 3.2.1 and 3.5.2.

<sup>160</sup> Eisenberg & Miller 2004a, p. 47-48, Eisenberg & Miller 2010, p. 255-256, and Eisenberg, Miller & Germano 2017, p. 942-944.

<sup>161</sup> See also section 3.5.4.

<sup>162</sup> See also section 3.4.5.

<sup>163</sup> Morabito 2012, p. 251-257, Wasserman 2000, p. 463-484.

<sup>164</sup> Wasserman 2000, p. 462.

to abusive behaviour that originates from a conflict of interests<sup>165</sup> and does not necessarily affect the objective of efficiency, but rather that of (fair) compensation, and this will be discussed in section 3.5.5.3.

In the US, competing class actions are common. An estimated 20-50% of mass disputes result in competing class actions.<sup>166</sup> In Australia, competition is less common but not entirely absent. In 2012, Morabito conducted an empirical study on 45 Australian competing class actions with regard to 17 mass disputes.<sup>167</sup> Although cautiously, given the lack of reliable data on the overall numbers, he estimates that 12.8% of all federal class actions are competing class actions. In 2016, he reported a slight increase to 15%.<sup>168</sup> Australia's class action is an opt-out device, but allows for closed class actions that only include those class members that have entered into a litigation funding arrangement.<sup>169</sup> Morabito refutes the assertion that competing entrepreneurial parties that seek the most profitable form of litigation are responsible for competing class actions, by observing that two of the 17 mass disputes incited (nine) competing class actions by different law firms in which only non-monetary relief was sought.<sup>170</sup> Furthermore, while endorsing closed class actions has increased the number of competing ones, 40% of those cases did not involve a third-party litigation funder. Moreover, the endorsement has reduced the number of overlapping class actions.<sup>171</sup>

In his evaluation of the case law on competing class actions, Morabito concludes that the risk that class members are included in multiple actions filed by competing attorneys is mitigated not so much by way of judicial (pro)activity, but due to the competing lawyers' prompt action and cooperative conduct. As a consequence:

*(...) Australian class members have not been the recipients of multiple opt out notices and/or settlement notices from competing class actions and, as a result, have not been confronted with the challenging, if not daunting, task of understanding the practical ramifications of being bound at the same time by more than one class action filed by different lawyers with respect to the same dispute and then determining what steps to take, with respect to the proceedings in question, to advance their interests.*<sup>172</sup>

In both jurisdictions, several solutions have been implemented to deal with competing classes, such as consolidating proceedings and maintaining separate representation and funding, multidistrict litigation statutes, or the appointment of a lead counsel.<sup>173</sup> Hence, this risk is very much linked to the

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<sup>165</sup> Hence, not the abusive behaviour as will be discussed in section 3.5.4.

<sup>166</sup> See Morabito 2012, p. 250, with further references to, inter alia, Willging & Lee 2007 (see Lee & Willging 2008), examining data on federal class actions in the period of 2001-2006, and Hensler e.a. 2000.

<sup>167</sup> Morabito 2012.

<sup>168</sup> Morabito 2016, p. 8.

<sup>169</sup> Morabito 2012, p. 251, 284, Waye & Morabito 2017, p. 186-188, and Waye & Morabito 2018.

<sup>170</sup> Morabito 2012, p. 288-290, 314.

<sup>171</sup> Morabito 2012, p. 314.

<sup>172</sup> Morabito 2012, p. 278.

<sup>173</sup> See, for instance, (the case law mentioned in) Waye & Morabito 2017, p. 187-188, Morabito 2012, p. 257-258, and Wasserman 2000.

design of the collective redress mechanism. An issue of competition that is related to opt-out mechanisms is that those parties that lose the competition battle might incite class members to opt out and pursue their own action.<sup>174</sup> Opting out is anything but abusive, but might cause inefficiency if it is followed by a competing (class) action and hinders finality (a defendant's incentive to settle), and might reduce the objectives of deterrence or compensation if it is not followed by another action or settlement. In the USA, however, the frequency of objectors and opt-outs is low. Empirical research by Eisenberg, Miller & Germano shows that between 1993 and 2014, 0.115% of the class in the studied cases (n=286) filed any objection, and the opt-out rates averaged 0.544% of the class (n=244).<sup>175</sup>

The effect of the introduction of a US-inspired common fund on the level of competing Australian class actions has been tested by Morabito in 2017. The (limited)<sup>176</sup> data suggest that the court's aim to reduce closed classes (and, therewith, competition) by allowing a common fund seems to work, as the number of open classes has risen.<sup>177</sup>

### **3.5.3 Adverse selection (cherry picking)**

The other side of a thorough screening and selection process, as discussed in section 3.4.3, is that it might lead to an adverse selection problem: only particular cases are selected. Since entrepreneurial parties' (main) goal is to maximise the return on investment, they are likely to select those with the largest expected return on investment and not – necessarily – meritorious claims that have the 'most culpable defendant' or that could benefit from funding in order to enable access to justice.<sup>178</sup> Hence, the benefit of improving access to justice (and therewith the objectives of compensation, deterrence and efficiency) might be limited to certain types of cases.

First of all, there is only a selection problem if the market is insufficiently competitive and/or alternative initiatives are unavailable, such as (semi-)public bodies that resolve those cases that are less attractive for entrepreneurial parties. For instance, Coffee has observed that large law firms might pursue the largest class actions, yet boutique firms or start-ups cover the small(er) ones.<sup>179</sup>

An entrepreneurial party's selection can include the type and risk/complexity (legal or factual ease) of the case, its amount in dispute (a high value will lead to a potentially spectacular return), its impact (high-profile cases are likely to acquire media coverage and might require less efforts to attract class members), and/or the opponent's potential assets (a defendant with deep pockets to actually recover a settlement or an award in the case of success). Indeed, entrepreneurial lawyers are said to turn down

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<sup>174</sup> Coffee 2015, p. 75, Morabito 2012, p. 259-267.

<sup>175</sup> Eisenberg, Miller & Germano 2017, p. 960, which confirms the findings in Eisenberg & Miller 2004 (covering 1993-2003), in which the main conclusion was that opt-outs and objections are extremely uncommon.

<sup>176</sup> The judgment that allowed such fund stems from 2016, see section 3.2.1.

<sup>177</sup> Morabito 2017, p. 40.

<sup>178</sup> Coffee 2015, p. 144, Shepherd 2012, p. 595, Van Velthoven & Van Wijck 2016.

<sup>179</sup> Coffee 2015, p. 74.

cases with a relatively low value.<sup>180</sup> They might be risk-averse and ‘tend to drop low-stake, low-probability cases if the success fee does not justify the risk that they are ‘buying’’.<sup>181</sup> Abrams & Chen have reported this effect for Australia; they show that litigation funders need a minimum amount in dispute.<sup>182</sup> A large portfolio might mitigate this risk, as the aim is then to maximize profit in the portfolio as a whole.

If a collective redress mechanism is designed particularly to serve negative-value claims, they might not be the ones that benefit from the entrepreneur’s activities. However, the aggregation of a range of negative-value claims will often constitute a positive-value claim and possibly exceed a funder’s required minimum amount in dispute. Nevertheless, entrepreneurial parties might still focus on those cases with the largest potential value, as aggregate litigation is normally more complex, time-consuming and costly.

As to the types of cases, various American and Australian data show that securities class actions are the most popular type for funders. Commercial litigation is popular, too, as such claims are said to be well documented.<sup>183</sup> Not surprisingly, given their business model, entrepreneurial parties are less likely to pursue claims where no monetary relief is sought. For instance, IMF Bentham states that it does not fund claims where the legal remedy sought is exclusively injunctive, declaratory or other non-monetary relief.<sup>184</sup>

### **3.5.4 Abusive behaviour**

The large profits that entrepreneurial parties can obtain in mass litigation might incentivize them to engage in opportunistic behaviour. This affects the objectives of (fair) compensation, deterrence (overdeterrence), and efficiency (excessive, frivolous litigation).<sup>185</sup> Abusive behaviour can take various shapes. The most often expressed fear is that entrepreneurial parties will pursue unmeritorious claims with the intention of coercing the alleged wrongdoer into a settlement; this is also known as a blackmail settlement and frivolous litigation. A blackmail settlement differs from the settlements that will be discussed in section 3.5.5, as a blackmail settlement does not necessarily stem from a conflict of interests between the entrepreneurial party and class members, but from a bad motive in general. Abusive conduct can, furthermore, be displayed by way of aggressive marketing/selling tactics; this is also known as ambulance chasing, and by putting forward an empty shell in order to escape a potential adverse costs award. These three topics (blackmail settlement, ambulance chasing and empty shells) will be discussed subsequently in this section.

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<sup>180</sup> Visscher & Schepens, referring to Kritzer 1997.

<sup>181</sup> See the overview of empirical literature in Keske e.a. 2010, p. 76 ff.

<sup>182</sup> Abrams & Chen 2013, p. 1088.

<sup>183</sup> See Fitzpatrick 2010, Veljanovski 2012, Abrams & Chen 2013, Waye & Morabito 2017, and Eisenberg, Miller & Germano 2017.

<sup>184</sup> <imf.com.au/funding/apply-for-funding>.

<sup>185</sup> See hereafter.

In 1971, Handler substantiated the blackmail settlement thesis.<sup>186</sup> If it is cheaper to settle than to go to court, occur litigation costs and potentially suffer reputational and internal damage, theoretically, a rational defendant might enter into a settlement even though the underlying claim lacks merits. Obviously, such practices are deemed undesirable. If 'defendants who maintain their innocence have no practical alternative but to settle, they have been de facto deprived of their constitutional right to a trial on the merits.'<sup>187</sup> Any compensation that follows from such a settlement lacks legal justification. Furthermore, it is said to have a broader negative effect:

*[t]his will result not only in undesirable distribution effects but also in a loss of trust in the legal order leading to costly evasion reactions of the defendants and excessive production costs of goods thereby causing efficiency losses. It is thus questionable whether the broader social benefits of class action as a result of higher deterrence exceed the associated social losses which result from increased possibilities of lawsuits with low success rates and large settlement options which are undesired from a legal policy perspective.*<sup>188</sup>

However, there are various issues that weaken the theoretical underpinning and/or mitigate the risk of blackmail settlements and frivolous litigation. They relate to the definition, source and proof thereof.

The first issue is the lack of a clear definition of the concept of unmeritorious or frivolous litigation. When can a settlement be qualified as blackmail? Is a claim with a low success probability due to uncertainty concerning the (interpretation of) law actually abusive? And what is 'low' in this regard? Might a settlement in a small-claim class action that hardly benefits the claimants, but leads to excessive fees for the entrepreneurial party, be considered 'a reason for thinking that a defendant is right to settle, not for thinking that a defendant is coerced'?<sup>189</sup> Silver explains how a blackmail settlement is a metaphorical rather than a legal concept, emphasizing that no theory has actually identified bad motives or how settlement demands relate to coercion.<sup>190</sup>

Related to this aspect is the lack of clarity as to which (combination of) feature(s) create(s) the coercive power of a class action. Is it the mere fact that it is driven by an entrepreneurial party in search of a jackpot? Or is it – also – the large litigation costs of a class action, particularly in a jurisdiction such as the USA with a costly pre-trial discovery and information gathering phase? Is it – also – attributable to the American rule (parties bear their own litigation costs) which might incite claimants to bring claims with a low success probability, and/or punitive damages?<sup>191</sup> Does it – also – follow from the uncertainty on the (interpretation of) law?<sup>192</sup> Is there a lack of (procedural) safeguards to prevent abuse? Can reputational damage and judicial certification (and the appellate review thereof) provide such

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<sup>186</sup> Handler 1971.

<sup>187</sup> Handler 1971, p. 9.

<sup>188</sup> Schaefer 2000, p. 188.

<sup>189</sup> Silver 2003, p. 1365-1369.

<sup>190</sup> Silver 2003, p. 1386-1390.

<sup>191</sup> Coffee 2016, p. 29.

<sup>192</sup> Handler 1971, p. 11.



safeguards? For instance, Silver argues that even if Handler's argument is true that abusive behaviour constitutes a due process violation, this argument is no longer persuasive as changes in the class actions regulation/management make 'this form of blackmail exceedingly unlikely. Most trial judges apply the certification requirements scrupulously, and appellate judges eagerly correct their mistakes on interlocutory review.'<sup>193</sup>

Finally, there is little evidence on the existence of blackmail settlements or engagement in frivolous litigation by entrepreneurial parties. Instead, unmeritorious claims might not pass the thorough screening by such parties, as discussed in section 3.4.3. Various scholars have stated and/or shown that neither economic models nor empirical evidence support the conventional wisdom that contingency fee arrangements lead to an increase in frivolous litigation.<sup>194</sup>

Nevertheless, various incidents can be and have been labelled as abusive. An illustrative example of a questionable motive to fund a case – although it does not concern a class action – is the case brought by Hulk Hogan against the tabloid publisher Gawker. Hulk Hogan was funded by a third party that held a grudge against Gawker. According to Gawker's attorneys, this led to some questionable litigation strategies, such as selecting a legal ground that would prevent Gawker from using insurance pay outs, and turning down 'several large settlement offers'. This was deemed peculiar as Hogan was allegedly experiencing financial problems; 'taking a multi-million dollar settlement appears to make more sense in that situation than taking a case to court with no guarantee of a victory.'<sup>195</sup> However, as Hogan's claim was eventually successful, the claim obviously did not lack merits. The motive of this particular funder might have been different or more than a mere entrepreneurial one, but, here too, the normative problem is debatable. Is this particular motive to support an apparently meritorious claim undue or inefficient? How does this relate to litigation in which we have no idea or interest as to where the money to litigate comes from? Obviously, the perspective changes if the entrepreneurial motive leads to abusive behaviour such as bribing 'in-house' plaintiffs, objectors to a settlement approval, experts, witnesses, and so on. Such abusive behaviour is also related to the competition between entrepreneurial parties. An illustrative example is the Milberg, Weiss scandal, in which four attorneys of this law firm (specializing in securities class actions) were imprisoned for paying 'kickback payments' to their 'in-house' plaintiffs in order to incentivize them to act as lead plaintiff and in order to improve their chances of being selected as class counsel.<sup>196</sup>

Another type of abusive behaviour is ambulance chasing and aggressive marketing techniques, whether or not amplified by the possibility to award or receive referral fees. Ambulance chasing is the negative side of an entrepreneurial party's active search for (mass harm) claims. It refers to the situation in which competing parties try to find claims by all possible means through various (media) chan-

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<sup>193</sup> Silver 2003, p. 1390. See also Schaefer 2000.

<sup>194</sup> See, for instance, Miceli 1994, Kritzer 1997, Helland & Tabarrok 2003, Silver 2003, Faure, Hartlief & Philipsen 2006a, Visscher & Schepens 2010, and Faure & Hartlief 2012. On the contrary see, for instance, Abramowicz 2005, Lysaught & Scott Hazelgrove 2012, and Abramowicz & Alper 2013.

<sup>195</sup> R. McCormick, A Silicon Vally billionaire is reportedly funding the legal war to end Gawker, *The Verge*, 25 May 2016.

<sup>196</sup> Coffee 2015, p. 64-77.

nels. The term originates from personal injury lawyers that needed to operate on a high-volume basis,<sup>197</sup> but the risk applies similarly to entrepreneurial repeat players in class actions. A modern-day example is solicitation by way of robocalling (automated telephone calls) that reduce entering into a class action to merely pushing a phone button. In the USA, there has even been a class action filed against robocallers that aimed to solicitate claimants for a class action.<sup>198</sup> The risk of ambulance chasing also relates to competition between entrepreneurial parties.<sup>199</sup>

A final example of abusive behaviour concerns an intentional lack of financial means, in particular by supporting or putting forward an empty shell. This risk entails three aspects. First, from the defendants' perspective, there is the risk of not being able to recover an adverse costs order. A possible immunity of class members from such costs might leave a successful defendant in an unfavourable position.<sup>200</sup> Second, from the class members' perspective, a settlement or award paid to the entrepreneurial party or empty shell might evaporate in the case of insolvency or fraud. Third, also from the class members' perspective, the entrepreneurial party might lack the financial means to fully pursue or support the action. Obviously, an entrepreneurial party's lack of sufficient financial means is not necessarily a result of its abusive behaviour. However, if litigation is deemed vexatious and the entrepreneurial party had substantial control over the litigation, various courts have held litigation funders to be liable for adverse costs even though they were not a formal party to the litigation.<sup>201</sup> An illustrative example is the action against Walt Disney, where the third-party funder of a shell company's claim was held liable for Walt Disney's attorney fees. The court deemed the claim 'implausible, at best', the pursuit thereof 'objectively unreasonable', and the appeal legally and factually unreasonable. Furthermore, the funder had testified that it knew at the outset of litigation that the plaintiff had no assets, and that it had the ability to direct and control litigation. Hence, it was held liable for the adverse litigation costs. In order to assess the extent of its liability, the funder was ordered to disclose the funding agreement and to identify data on, inter alia, its investors.<sup>202</sup>

### **3.5.5 Conflict of interests**

#### **3.5.5.1 Two types of inadequate settlements**

In the previous section, I discussed abusive (blackmail) settlements, where a defendant settles in order to prevent a worse scenario, such as high litigation costs or reputational damage. There are two other types of settlements that are deemed undesirable: premature and collusive settlements. In both situations, the settlement amount is set too low, and therewith creates underdeterrence and unfair compensation, while it benefits the entrepreneurial party. Both types of settlement result from a conflict

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<sup>197</sup> Karsten 1998, p. 256 ff, Coffee 2015, p. 21.

<sup>198</sup> *Maclean v. Arentz Law Group*, US District Court of Texas, 2017 WL 3221170. See also A. Frankel, 'Client solicitation 101: Don't robocall the guy running the mass tort', *Reuters* August 30, 2016.

<sup>199</sup> See sections 3.4.2, 3.5.2 and 3.5.5.3.

<sup>200</sup> Kalajdzic, Cashman & Longmoore 2013, p. 98.

<sup>201</sup> *Lage v. Blanco*, US District Court of Appeal of Florida, 1988 WL 18579, *Abu-Ghazaleh v. Chaul*, US District Court of Appeal of Florida, 2009 WL 4283085, *Visoly v. Security Pacific Credit Corporation*, District Court of Appeal of Florida, 2000 WL 1153879, and *Stan Lee Media v. The Walt Disney Company*, US District Court of Colorado, 2015 WL 5210655.

<sup>202</sup> *Stan Lee Media v. The Walt Disney Company*, US District Court of Colorado, 2015 WL 5210655.

of interests between class members (principals) and their agent, the entrepreneurial party. As explained in section 3.4.5, an agency problem arises from an information asymmetry and the inability or incapacity of class members to observe, control and evaluate their agent's behaviour. If they could do so, the agent might put in the desired effort and act in their interests. Another method to mitigate the agency problem is a result-based remuneration. However, the alignment of interests that such remuneration constitutes might not suffice. The size (the amount in dispute), complexity and costs of mass litigation might still incentivize the entrepreneurial party to act in his own interest: to ensure a – sufficient – return on investment, possibly at the expense of class members' interests by settling for too little.

In the USA, most class actions are settled.<sup>203</sup> In Australia, too, the involvement of third-party litigation funders has attributed to an increase in the percentage of settled class actions.<sup>204</sup> If conflicting interests and the inability of class members (or other safeguards) to identify or repair the conflict render such settlements inadequate, this obstructs the objectives of (fair) compensation and/or deterrence (underdeterrence; such a settlement does not force the defendant to internalize all of the damage caused).<sup>205</sup>

### 3.5.5.2 Premature settlement

In theory, an entrepreneurial motive (result-based remuneration) creates an incentive to enter into a settlement as early as possible, as opposed to the situation in which an attorney operates under an hourly fee. By doing so, the entrepreneurial party receives its share of the proceeds, ensuring the cash inflow, and avoids further costs of negotiation or litigation.<sup>206</sup> This incentive might be enhanced by the high amount in dispute in mass litigation; an early (low) settlement might still amount to a relatively large return on investment, which does not – necessarily – correspond with the efforts that were put into the case.<sup>207</sup>

An early settlement is not necessarily inefficient or undesirable. On the contrary, under normal circumstances it is preferable over litigation as it limits litigation costs and efforts from the perspective of class members, defendants as well as the judiciary and society.<sup>208</sup> Nevertheless, an early settlement is considered inadequate if claimants would have been better off going to trial given the expected value of the claim.<sup>209</sup> Although this expected value might be difficult to estimate (see also section 3.4.3) 'one may be fairly confident that the extent of the compensation for the attorneys involved is handsome and that for the class members, less so.'<sup>210</sup>

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<sup>203</sup> Hensler 2010, p. 155, Marcus 2013, p. 154.

<sup>204</sup> Morabito 2017, p. 37.

<sup>205</sup> Faure & Visscher 2015.

<sup>206</sup> Coffee 1983, Gravelle & Waterson 1993, Schaefer 2000.

<sup>207</sup> Visscher & Schepens 2010, p. 26, with further references.

<sup>208</sup> Faure 2013.

<sup>209</sup> Miller 1987, p. 189-190, Fisch 2002, p. 660, Tzankova & Kortmann 2010, p. 124.

<sup>210</sup> Ulen 2011, p. 193.

The extent to which an entrepreneurial party indeed enters into an early settlement depends on various factors, as identified in various theoretical and empirical studies.<sup>211</sup> First, the risk of an inadequate settlement is enhanced if the entrepreneurial party controls the decision-making process and is insufficiently monitored. Although the actual level of control depends on the specific funding agreement and/or the design of the collective redress mechanism (opt-out or opt-in), the entrepreneurial party can be expected to exercise at least some influence on the decision-making process.<sup>212</sup> As mentioned, monitoring the agent's behaviour can prevent a conflict of interests. This can be done by class members (in particular professional, well-informed ones), the attorney (if he is not affiliated with the entrepreneurial party), and by intervening courts (if the settlement requires approval and it is not motivated by self-interest).<sup>213</sup> Moreover, the type of entrepreneurial party is relevant. Rickman has explained how contingency fee attorneys that are confident and drive a hard bargain in the negotiation process will reject an early (too low) settlement proposal.<sup>214</sup> Furthermore, an altruistic lawyer will be less inclined to put his own interest over that of a client.<sup>215</sup> Anecdotal evidence is provided by Coffee in his description of the rise and fall of Milberg, Weiss (a US law firm specialized in securities class actions):

*'The styles of Lerach and Weiss [managing partners of the California respectively New York branch of the law firm] were simply irreconcilable. Weiss was a "settler" who wanted to play within the rules of the game, while Lerach was an angry iconoclast who did not need to be accepted by the established bar and preferred to pressure his adversary for a record settlement, rather than agree to an early one.'*<sup>216</sup>

### 3.5.5.3 Collusive settlement

The second type of an inadequate settlement is a collusive settlement. For such a settlement, the following elements need to be present: competing actions and 'unsavoury' attorneys. If there are competing class actions that represent the same class, an unsavoury lawyer on the claimants' side might enter into an inadequate (too low) settlement with the defendant in return for a generous fee (a so-called reverse auction).<sup>217</sup> This also requires a defendant, or its attorney, that 'exploits' the claimant attorney's interest, but such behaviour on the defendant's side is not necessarily undue.<sup>218</sup>

An example of an inadequate settlement driven by collusion is a so-called coupon settlement. Class members receive a discount on the defendant's products – which are hardly used, or can be profitable for the defendant as well – and the entrepreneurial party receives a sizeable fee.<sup>219</sup> Another type of

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<sup>211</sup> See, for instance, Kritzer 1990, Schaefer 2000, Helland & Taborrok 2003, Coffee 2010, Faure, Fernhout & Philipsen 2010, Fenn & Rickman 2010, Van den Bergh 2013, Chen & Abrams 2013, Issacharoff 2014.

<sup>212</sup> See, for instance, Hensler 1989, Macey & Miller 1993, Bentham Europe 2014.

<sup>213</sup> On judicial monitoring, see also hereafter section 3.5.5.3.

<sup>214</sup> Faure, Fernhout & Philipsen 2010, p. 38, referring to Rickman 1999.

<sup>215</sup> Miller 1987, Gravelle & Waterson 1993.

<sup>216</sup> Coffee 2015, p. 76. See also section 3.5.4.

<sup>217</sup> Hensler 2010, p. 157, Marcus 2013, p. 156, Wasserman 2000, p. 470 e.v, Coffee 2015, p. 58, 157.

<sup>218</sup> Coffee 2015, p. 58.

<sup>219</sup> Howells 2011, Marcus 2013, p. 157, Wrba 2015, p. 116.

collusive settlement is the one in which the entrepreneurial party negotiates a disproportionate cut of the pie (a fixed remuneration or a result-based one), which reduces the class members' (fair) compensation. In both situations, defendants and entrepreneurial parties win and class members lose.

Over the years, various methods have been implemented to address the risk of unfair coupon settlements and/or disproportionate fees for attorneys. A solution to address coupon settlements is to link the attorney fees to the value of the claimed proceeds, that is, the redeemed coupons.<sup>220</sup> Furthermore, judicial approval of the settlement, including of the attorney fees, is considered an important safeguard.<sup>221</sup> American courts assess the attorney fee separately, even if parties have stated that the class members' compensation and attorney fees have been negotiated separately, no objections against the settlement or fees were filed, and/or the fee is not calculated as a percentage of the proceeds.<sup>222</sup> However, some have raised concerns as to whether the high expectation of such judicial scrutiny is fully justified.<sup>223</sup> For instance, Helland and Klick found (empirically) that judges in class actions 'more easily grant the attorney's fee request in order to terminate cases rapidly, thus avoiding court congestion (which may damage their reputation)'.<sup>224</sup> Furthermore, courts might not be fully equipped to assess the reasonableness of the fee (information asymmetry). Finally, class members (or an entrepreneurial party on their behalf) can file objections against the reasonableness of the settlement. Here, too, the instrument might not fully suffice, as some so-called 'professional objectors' have been said to fall foul of adequate behaviour as well, as their main reason to object is to earn a fee for 'improving' the settlement.<sup>225</sup>

### **3.6 Benefits, drawbacks and the objectives of collective redress**

Now that the benefits and drawbacks of entrepreneurial mass litigation have been established, it is time for a summarizing overview of these effects in light of the objectives of collective redress mechanisms. How the potential effects affect the objectives of collective redress has been described in the previous separate sections. This is schematically depicted in Table IV. The potential effects are presented as more or less opposite sides of the coin, which can positively or negatively affect the objective(s) of collective redress mechanisms: deterrence (a), compensation (b), or efficiency (c).

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<sup>220</sup> Howells 2011, referring to Hensler e.a. 2000.

<sup>221</sup> Federal Rules of Civil Procedure 23(h); see also the Report of the Judicial Conference Committee on Rules of Practice and Procedure, September 2002, p. 19-21 and the Report of the Civil Rules Advisory Committee (Appendix B), p. 116-122; available at <[uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2002](http://uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2002)>. See also Hensler 2010, p. 158 ff, Marcus 2013, p. 157 ff, and Eisenberg, Miller & Germano 2017, p. 938.

<sup>222</sup> See the aforementioned Report of the Civil Rules Advisory Committee, p. 118, and Hensler 2010, p. 157.

<sup>223</sup> Faure 2013, p. 59, with further references. See also Biard 2014, and Faure & Visscher 2016.

<sup>224</sup> Faure 2013, p. 59, referring to Helland & Klick 2007.

<sup>225</sup> Marcus 2013, p. 156.

Potential benefits	Affected objective(s) (+)	Potential drawbacks	Affected objective(s) (-)
1. Facilitate access to justice	a, b	6. Fuel a claim culture	a, b, c
2. Competition	a, b, c	7. Inefficient competition	c
3. Increase the quality of claims	a, b, c	8. Adverse selection / cherry picking	a, b
4. (E)quality of arms	c	9. Abusive behaviour	a, b, c
5. Alignment of interests	a, b, c	10. Conflict of interests	a, b

Table IV Effects that positively (+) or negatively (-) affect the objectives of collective redress mechanisms

Whether and the extent to which these effects take place, also depend on the specific features of a national legal system.<sup>226</sup> In the following part of this book (Chapters 4-6), I will turn to the three selected jurisdictions, and investigate the legal rules and features that are closely connected with and shape the operation of entrepreneurial mass litigation (sub-question 3). Based on the potential effects, I have selected the following key issues of entrepreneurial mass litigation. After a brief introduction to some of the jurisdiction's civil justice settings, each chapter will address the relevant national regulation and case law on:

- The legal services market in which entrepreneurial parties (might) operate – which types of legal representatives are active in the collective redress market, and how are the activities of these parties regulated and/or supervised?
- The litigation funding regime – which types of (mass) litigation funding exist and how are the funding arrangements regulated and/or monitored? This part has focused particularly on rules on result-based remuneration and the alienability of legal claims;
- The litigation costs and costs shifting – how are (mass) litigation costs calculated, controlled, and distributed between the parties involved?
- The specificities of the collective redress mechanisms that affect the functioning of entrepreneurial mass litigation. In light of the potential risks of entrepreneurial mass litigation, this includes the safeguards against abusive behaviour that have been put in place to protect (absent) class members and/or defendants.

As the selected jurisdictions' experience, so far, with entrepreneurial mass litigation is relatively limited, the overviews offer a first inventory, to be placed within the context of the objectives of collective redress and the benefits and drawbacks of entrepreneurial mass litigation. The chapters do not aim to provide an exhaustive overview of the three legal systems and cultures on collective redress. Obviously, there are other relevant issues for obtaining collective redress, such as the burden and standard of proof, and the disclosure of documents. I have sought to describe those issues that are the most closely connected to – the operation of – entrepreneurial mass litigation. Addressing these key issues will provide an insight into the role and regulation of entrepreneurial parties and their funding arrangements, how they (might) function within a specific jurisdiction's legal architecture of mass litigation and its costs, and how class members and/or defendant(s) are protected.

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<sup>226</sup> See section 1.2.4.2.

From these country studies, I will distil the rules and features that potentially mediate the beneficial or disadvantageous operation of entrepreneurial mass litigation, per addressed key issue. In Chapter 7, the rules and features of the three jurisdictions are assembled and analysed within the framework of the objectives of collective redress and the potential risks and benefits of entrepreneurial mass litigation.





## **Part II: Legal and Practical Framework**



## 4 Germany

*'Die Ansätze im deutschen Rechtssystem bleiben halbherzig, genährt von dem Misstrauen gegen heraufdräuende amerikanische Verhältnisse.'*<sup>1</sup>

### 4.1 Setting the scene: some essential features of the civil justice landscape

German civil law is internationally recognized as an authoritative and influential body of rules.<sup>2</sup> In rankings, Germany continues to feature among the countries with an efficient legal framework for settling disputes. For instance, in the Rule of Law Index 2016, Germany was placed second in the category of civil justice.<sup>3</sup> According to some, complaints about litigation explosions or excessive litigation costs and delays are comparatively rare in Germany.<sup>4</sup> This does not mean, however, that the German legislator is resting on its laurels. On the contrary, some have described it as 'somewhat hyperactive'.<sup>5</sup>

The German court system for private law matters is structured as follows. Non-specialized,<sup>6</sup> general (*ordentliche*) civil litigation can take place at the local state courts (*Amtsgerichte*), the state district courts (*Landgerichte*), the state appellate courts (*Oberlandesgerichte*), and at the Federal Supreme Court (*Bundesgerichtshof*). Local state courts deal with cases with a dispute that does not exceed € 5,000, or that concern family law, tenancy and certain (other) non-contentious matters.<sup>7</sup> In other civil matters, the district court has jurisdiction as the court of first instance. A party that wishes to appeal needs permission to do so. Fundamental rights can affect private law through the federal constitutional court (*Bundesverfassungsgericht*).

German civil litigation is built upon a number of guiding principles, some of which are embedded in the German Constitution.<sup>8</sup> Access to justice (*Verfahrensgrundrecht* and *Justizgewähranspruch*) is not laid down in the German Constitution as such; however, it is widely accepted to follow from general

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<sup>1</sup> Micklitz 2012a, p. 101, on the German legislator's hesitant approach towards collective redress.

<sup>2</sup> Koziol 2012, p. 2, Siems 2014, p. 43.

<sup>3</sup> Provided by the World Justice Project. See [worldjusticeproject.org/sites/default/files/media/wjp\\_rule\\_of\\_law\\_index\\_2016.pdf](http://worldjusticeproject.org/sites/default/files/media/wjp_rule_of_law_index_2016.pdf), p. 40-41 (Factor 7: Civil Justice). Germany scores .73 on Accessibility and affordability (with an overall score on civil justice of .86), see p. 86. In comparison: the UK scores 0.56 (with an overall score on civil justice of .75) and the Netherlands scores .78 (with an overall score of .88), see p. 152 and 117. See also the Global Competitiveness Index 2016-2017, as reported by the World Economic Forum; see <[www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017\\_FINAL.pdf](http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf)>, p. 187. Germany ranks 17<sup>th</sup> (out of 138 jurisdictions) on the indicator 'efficiency of legal framework in settling disputes' (no. 1.10). In comparison: the Netherlands ranks 12<sup>th</sup> and the UK 6<sup>th</sup> on this indicator, see p. 277 and p. 355.

<sup>4</sup> Murray & Stürner 2004, p. 22, Zuckerman 1999, p. 31.

<sup>5</sup> Saenger 2010, p. 17.

<sup>6</sup> Germany also has four specialized court systems: labour law, administrative law, tax law, and social welfare.

<sup>7</sup> § 23(1) GVG (*Gerichtsverfassungsgesetz*, Constitution of the Courts Act).

<sup>8</sup> Baetge 2009, p. 125.

constitutional principles.<sup>9</sup> A major reform of civil procedure took effect in 2001.<sup>10</sup> The amendment of – in particular – the German Code of Civil Procedure (ZPO) was intended to bring justice closer to the people and to enhance the efficiency and transparency of civil litigation.<sup>11</sup> For instance, the reform placed a stronger emphasis on courts' case management powers (*Prozessleitung*).<sup>12</sup> It complements two main principles in civil litigation: party presentation (*Verhandlungs- or Beibringungsgrundsatz*) and party control of litigation (*Dispositionsmaxime*). Pursuant to these principles, parties are first and foremost responsible for the scope of litigation, submitting issues and evidence, and for the decision to commence or halt litigation.<sup>13</sup> However, nowadays, dispute resolution is a joint responsibility of the parties and the court (*Kooperationsmaxime*). The court does not investigate the facts, but has to assist, exercise control, and take evidence where necessary. In this way, it has various discretionary powers to determine the course of a trial.<sup>14</sup> It can ask questions and give instructions to litigants (*Aufklärungs- und Hinweispflichten*). Some scholars have discussed to what extent German civil trials are nowadays inquisitorial or adversarial; the legislator seems to have at least opened the door to a more investigatory approach.<sup>15</sup> The 2001 reform has furthermore facilitated consensual dispute resolution at the earliest occasion. In principle, courts are required to organize a conciliation hearing in all civil cases (*Güteverhandlung*). This hearing takes place before a judge with the aim of reaching a settlement prior to the oral hearing.<sup>16</sup> According to Murray and Stürner, it is quite common for a judge to propose a particular settlement based on a preliminary review of the case.<sup>17</sup> Dispute resolution at the earliest appropriate occasion is also stimulated by the rules on costs.<sup>18</sup>

The joint responsibility of the parties and the courts may be the root cause for the said efficiency of the German civil justice system.<sup>19</sup> However, this efficiency does not necessarily apply to large and more complex cases, in particular given the relative unavailability of efficient collective redress.<sup>20</sup> As observed in section 2.2.2, this is related to the dominant role of individual (procedural) rights in German

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<sup>9</sup> Derived from § 2(1), 3(1) and 20(3) GG (*Handlungsfreiheit, Gleichheitssatz* and *Rechtsstaatsprinzip*). See Hess & Hübner 2012, p. 152, and Maultzsch 2014, p. 1, with further references. See also, for instance, BVerG 12.12.2006, 1 BvR 2576/04, NJW 2007, 979.

<sup>10</sup> Civil Procedure Reform Act (*Zivilprozessreformgesetz*). Two subsequent reforms that – also – altered civil procedure were the Modernisation of Justice Acts (*Justizmodernisierungsgesetze*) in 2004 and 2006 and those on the litigation costs regime (*Kostenmodernisierungsgesetze*) in 2004 and 2013.

<sup>11</sup> Deutscher Bundestag, *Gesetzentwurf der Bundesregierung zur Reform des Zivilprozesses*, Drucksache 14/4722, 24.11.2000, p. 1.

<sup>12</sup> § 139 ZPO. Deutscher Bundestag, *Gesetzentwurf der Bundesregierung zur Reform des Zivilprozesses*, Drucksache 14/4722, 24.11.2000, p. 1, 6 and 61 ff. See on German case management, for instance, Saenger 2010 and Rosenberg, Schwab & Gottwald 2010, p. 400 ff.

<sup>13</sup> Murray Stürner 2004, p. 11, Saenger 2010, p. 16-17, Rosenberg, Schwab & Gottwald 2010, p. 395 ff, Pohlmann 2014, p. 23 ff.

<sup>14</sup> Murray & Stürner 2004, p. 20.

<sup>15</sup> Kötz 2003: inquisitorial; Murray & Stürner 2004: fundamentally adversarial and party driven (p. 11). See also Baetge 2009, p.126 and Saenger 2010, p. 16.

<sup>16</sup> § 278(2) ZPO.

<sup>17</sup> Murray & Stürner 2004, p. 13.

<sup>18</sup> See also section 4.3.4.

<sup>19</sup> Murray & Stürner 2004, p. 20.

<sup>20</sup> Cf. Murray & Stürner 2004, p. 21.

private law: *‘das Leitbild des liberalen Individualismus (...): jeder soll über seine Lebens- und Rechtsverhältnisse frei bestimmen können’*.<sup>21</sup> The focus on individual (procedural) rights has led to critical responses to (proposed and implemented) collective redress mechanisms. Illustrative is the following comment on the model case/group action KapMuG regulation.<sup>22</sup> As to the tension between individual autonomy and regulatory objectives, Haar states:

*‘It stands to reason that one may question this practice of forcing an individual claimant into lawsuits. In fact, it reveals instances of the model case procedure where the law tries to take advantage of the individual claimants’ incentives and their money by using them and their lawsuits as a tool to enforce the regulatory goals of ad hoc disclosure.’*<sup>23</sup>

Generally, collective redress is regarded as an exception, not to be extended beyond its designated field of application.<sup>24</sup> Against this backdrop and in light of the industry’s strong opposition to and its lobbying against collective redress, unsurprisingly, the German government has politely welcomed the European Recommendation on collective redress, but in the same breath it has emphasized member states’ autonomy to decide on available collective redress instruments.<sup>25</sup>

## **4.2 The regulation and supervision of the legal services market**

The German legal services market is a strictly regulated one, in which attorneys (*Rechtsanwälte* and *Fachanwälte*)<sup>26</sup> play a key role, both in and out of court. Attorney representation is required in all cases before the state district court and beyond (*Anwaltszwang*).<sup>27</sup> A large number of litigants appoint an attorney to represent them before a local court as well.<sup>28</sup> This might be linked to the relatively large percentage of German households that have taken out a (before-the-event) legal expenses insurance.<sup>29</sup> Predictably, comparative research shows that the number of attorneys per inhabitant is relatively high in Germany.<sup>30</sup>

The prevailing opinion has long been to maintain the attorneys’ monopoly on legal advice and enforcement.<sup>31</sup> In the last few decades, there has been some shift in the notion of attorneys forming an inde-

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<sup>21</sup> Wendt 2011, at II.1.

<sup>22</sup> See section 4.5.4.

<sup>23</sup> Haar 2014, p. 102.

<sup>24</sup> Domej 2014, p. 287.

<sup>25</sup> Bundesrat, *Beschluss des Bundesrates*, Drucksache 513/13, 20.09.13, sub. 4.

<sup>26</sup> The latter is a specialized attorney; § 43c BRAO.

<sup>27</sup> § 78 ZPO.

<sup>28</sup> Murray & Stürner 2004, p. 161. See also the FRA report ‘Access to justice in Europe: an overview of challenges and opportunities’, national report Germany, available at <[fra.europa.eu/sites/default/files/fra\\_uploads/1526-access-to-justice-2011-country-DE.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1526-access-to-justice-2011-country-DE.pdf)>, p. 10.

<sup>29</sup> See section 4.4.1.

<sup>30</sup> Winter e.a. 2015, p. 57. Data from CEPEJ show that in 2014 Germany had 202 attorneys per 100,000 inhabitants (the Netherlands: 105, England and Wales: 315), see CEPEJ 2016, p. 160.

<sup>31</sup> Stadler 2017, p. 202. On extrajudicial legal services, see also hereafter.

pendent body for the administration of justice (*unabhängiges Organ der Rechtspflege*) towards a situation where the attorney is now seen as a profit-oriented services provider.<sup>32</sup> For instance, attorneys are now allowed to provide extrajudicial services for a fee that deviates from the statutorily fixed one, albeit under specific circumstances.<sup>33</sup> Generally, however, the idea remains that attorneys are the legal services providers that are best equipped to protect society's interests, in particular since they are guided by professional and ethical rules.<sup>34</sup> Within the context of collective redress, Micklitz has argued that – regardless of its fee structure – the attorney-entrepreneur is an essential key player:

*'It is his duty to keep the group action claimants together, to organise the process, to keep contact with the judge, to inform the press, in short, just like the judge must be a 'managing judge', the attorney must be a 'managing attorney'. The prototype of a 'managing attorney' is far away from the professional that still seems to form the self-image of the attorney. In practice the attorney-entrepreneur has long been a reality. Mr. Tilp (Telekom representative) considered himself a businessman; this produced under the attending attorneys, judges and academics not only consent at [a German symposium in 2006].'*<sup>35</sup>

Obviously, the latter observation is time and context-dependent. For instance, a decade later, Halfmeier states that the Telekom case has accelerated the emergence of a sophisticated plaintiff bar in capital market cases.<sup>36</sup> These developments will be further discussed in section 4.5.

The main regulations that currently apply to the legal services market are the Legal Services Act (*Rechtsdienstleistungsgesetz*, RDG), the Federal Attorney's Act (*Bundesrechtsanwaltsordnung*, BRAO),<sup>37</sup> the Attorney's Remuneration Act (*Rechtsanwaltsvergütungsgesetz*, RVG), and the Attorneys' Code of Conduct (*Berufsordnung der Rechtsanwälte*, BORA). Attorneys' main professional duties are laid down in § 43a BRAO, the interpretation of which can be further complemented by the ethical rules (BORA). They include independence, confidentiality, objectivity, integrity and professionalism. The regulations furthermore address topics such as publicity and remuneration.<sup>38</sup> As far as contingency fee arrangements are allowed, they are also subject to the legal rules that will be discussed in section 4.4.2. As for publicity, German attorneys have been permitted to advertise their services since 1995, as long as it provides functional information on the form and nature thereof and is not aimed at soliciting for being retained for a specific case.<sup>39</sup> An attorney is required to separate monies entrusted to

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<sup>32</sup> See § 1 and 2(2) BRAO and § 12 GG. See also Verkijk 2010, p. 55, p. 111 ff and p. 188 ff, with further references.

<sup>33</sup> § 4 RVG. See also sections 4.3.2 and 4.3.4.

<sup>34</sup> Verkijk 2010, p. 190-191, with further references.

<sup>35</sup> Micklitz 2007, p. 25, referring to the Symposium 'Collective Legal Enforcement – Chances and Risks' (February 2006 in Bamberg).

<sup>36</sup> Halfmeier 2016, p. 294 ff.

<sup>37</sup> Legal translation available at <[brak.de/w/files/02\\_fuer\\_anwaelte/berufsrecht/brao\\_stand\\_1.6.2011\\_englisch.pdf](http://brak.de/w/files/02_fuer_anwaelte/berufsrecht/brao_stand_1.6.2011_englisch.pdf)>.

<sup>38</sup> § 43b and § 49b BRAO.

<sup>39</sup> § 43b BRAO. This provision follows from the constitutionally guaranteed occupational freedom ('freie Berufsausübung'); § 12(1) GG. See, for instance, BGH 01.03.2001, I ZR 300/98, *DStRE* 2001, 1064; and BGH 15.03.2001, ZR 337/98, *DStRE* 2001, 1134.

his care.<sup>40</sup> A professional indemnity insurance is compulsory.<sup>41</sup> Attorneys are obliged to comprehensively and impartially advise their clients.<sup>42</sup> This includes informing clients about legal aid funding.<sup>43</sup> Some infer from this duty that attorneys are well advised to also discuss potential third-party litigation funding arrangements.<sup>44</sup> Others even state that attorneys have a duty to do so, following the professional rules or their contractual duty to protect a client from foreseeable damage.<sup>45</sup> Such a duty, however, requires a well-established market for litigation funding. In 2004, Jaskolla claimed that such a market is present in Germany, yet this is contested by others.<sup>46</sup> Over a decade later, the presence of such a market remains questionable.<sup>47</sup> Although a third-party litigation funder might pay the attorney's bills and triangulate the attorney-client relationship, the attorney's responsibility remains to protect his client's best interests.<sup>48</sup>

Attorneys are members and fall under the supervision of the Federal Chamber of Attorneys (*Bundesrechtsanwaltskammer*, BRAK), which functions as the Federal Bar Association. As of 2014, the BRAK includes an ombudsman (*Schlichtungsstelle*) to deal with disputes between clients and attorneys. Professional misconduct may be sanctioned by disciplinary measures under the BRAO and such misconduct will be dealt with by the Disciplinary Courts (*Anwaltsgericht* and *Bundesgerichtshof - Senat für Anwaltsachen*), or give rise to civil liability towards the client. Some have reported that the BRAK's supervision over the profession is relatively limited, and argue that private law norms and professional liability play a more important role.<sup>49</sup>

German rules on providing out-of-court legal services are rather restrictive, although they have been extended since 2002 and 2008. In 2002, the Legal Counsel Act (*Rechtsberatungsgesetz*, RBERG) weakened the attorney's monopoly on legal services. Since then, consumer organizations that are supported by public funding can enforce consumer claims, as long as their action is deemed to be necessary for consumer protection.<sup>50</sup> These organizations are authorized to represent parties and are not necessarily represented by an attorney.<sup>51</sup> The court may prohibit such an organization from continuing to represent consumers, if it is unable to appropriately present the circumstances and the facts.<sup>52</sup> At first, the courts were reluctant to allow such organizations to have standing. This changed in 2006, when the German Supreme Court ruled that although a collective interest to protect consumers is

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<sup>40</sup> § 43a(5) BRAO.

<sup>41</sup> § 51 BRAO.

<sup>42</sup> § 43a BRAO.

<sup>43</sup> § 16(1) BORA.

<sup>44</sup> Eversberg 2016 (with Roland ProzessFinanz AG).

<sup>45</sup> Heussen & Hamm 2016, § 54, Rn. 229-234, respectively Jaskolla 2004, p. 154-157, referring to the case law on this contractual duty.

<sup>46</sup> See, differently, Coester & Nitzsche 2005, p. 84-85.

<sup>47</sup> See section 4.4.3.

<sup>48</sup> Heussen & Hamm 2016, § 54, Rn. 250-252.

<sup>49</sup> Verkijk 2010, p. 59-60, Winter e.a. 2015, p. 59.

<sup>50</sup> § 1(3)(8) RBERG (old), now § 79(2)(3) ZPO. See Micklitz 2007, p. 13-14 and Stadler 2010, p. 82. See also sections 4.5.2 and 4.5.3.

<sup>51</sup> § 79(2) ZPO.

<sup>52</sup> § 79(2) ZPO.

required, this bar should not be set too high.<sup>53</sup> The RBerG was abolished in 2007, and superseded by the Legal Services Act (RDG) in 2008, which further relaxed the rules regarding out-of-court legal services. A legal service is now defined as any activity in a concrete 'foreign' claim (*fremde Forderung*) that requires a legal examination of the particular case.<sup>54</sup> The professional debt collection of assigned claims is considered to be a legal service, and a party may only provide such a legal service within the limits of the Legal Services Act.<sup>55</sup>

The German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, BaFin) overlooks the financial services market. Some have argued that litigation funding contracts (any type of *quota pars litis* arrangement) are specific types of (consumer) credit contracts, despite their non-recourse structure (the 'loan' is not repayable if enforcement is unsuccessful).<sup>56</sup> Therefore – if allowed at all – (the provider of) such contracts should adhere to financial services laws and regulations. This, however, goes against the prevailing doctrine that the funder-claimant relationship qualifies as a contract *sui generis* or a contract of undisclosed partnership.<sup>57</sup> So far, no measures have been implemented to regulate and supervise litigation funding, other than the fact that, as described above, they cannot provide legal services.<sup>58</sup>

### 4.3 Litigation costs and costs shifting

#### 4.3.1 Introduction

The litigation costs of German summary proceedings include court charges, witness and expert costs, and – if representation by an attorney is required – attorney fees. In addition, a party may have incurred pre-action costs before the claim was issued (extrajudicial costs). In the following, I will discuss the main elements of the German costs and costs shifting regime.<sup>59</sup>

#### 4.3.2 Litigation costs

One of the key characteristics of German litigation costs is the high level of predictability due to the statutory fixation of court charges and attorney fees. This allows parties to precisely calculate the litigation costs and the risk (the potential adverse costs award), usually as soon as the amount in dispute is identified.<sup>60</sup> Court charges are regulated by the Court Charges Act (*Gerichtskostengesetz*, GKG), and attorney fees by the Attorney Remuneration Act (RVG). Court charges, initially, are only paid – in advance – by the initiator of the proceedings, thus, the claimant.<sup>61</sup> A defendant only owes court charges

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<sup>53</sup> BGH 14.11.2006, XI ZR 294/05, *BKR* 2007, 79.

<sup>54</sup> § 2(1) RDG.

<sup>55</sup> Registered pursuant to § 10(1)(1) RDG. See also section 4.4.4 and 4.5.5.

<sup>56</sup> Bruns 2000, p. 240 ff, Bruns 2012, p. 542.

<sup>57</sup> Jaskolla 2004, p. 47-50, p. 145, Homberg 2006, p. 61 ff, Rosenberg, Schwab & Gottwald 2010, p. 466, Langheid & Wandt 2016, § 1, Rn. 107-109, Heussen & Hamm 2016, § 54, Rn. 248, Van Boom 2017, p. 15, all with further references. See also section 4.4.3.

<sup>58</sup> Eversberg 2016, p. 29.

<sup>59</sup> See also Hess & Hübner 2010, Wagner 2010.

<sup>60</sup> See Hess & Hübner 2010, p. 364.

<sup>61</sup> § 22(1) GKG.



if he is ordered to pay such charges if he loses.<sup>62</sup> The structure of court charges is said to generally cover most state expenses for the administration of justice by the civil courts.<sup>63</sup> The *inter partes* attorney fees are based on the RVG and ZPO (scales) and are recoverable pursuant to the costs shifting rules (which will be discussed in section 4.3.4). A party's *own* attorney's fees are based on the agreement with the attorney in question, which is governed by the RVG but not necessarily by its scales – see hereafter. These fees become due at an early stage and are not affected by the number of statements or other efforts throughout the proceedings.<sup>64</sup>

Generally, both types of costs (*Gebühren*) are tied to categorized amounts in dispute (*Streitwert* and *Gegenstandswert*).<sup>65</sup> The court has a discretionary power in determining the amount that is being disputed, and does so at the onset of litigation, based on the statement of claim.<sup>66</sup> The charges and fees are capped at the disputed amount of € 30 million, except for specific types of cases.<sup>67</sup> For instance, for court charges in claims for injunctive relief, the court will exercise its discretion in determining the amount in dispute, which is capped at € 250,000; for declaratory relief, generally, the court applies a discount of 20%.<sup>68</sup> Furthermore, there are some instances in which a court can adjust the disputed amount for the purpose of reducing the litigation costs and risk. In particular, in competition law cases the court can take into consideration the economic situation of the claimant, upon its request to tie the court charges and attorney fees to a reduced amount in dispute.<sup>69</sup> This provision intends to stimulate private enforcement. It only benefits claimants, a defendant cannot apply for such a reduction. The legislator compared the provision to a contingency fee: in case he loses, a claimant pays reduced court charges, his own attorney's fees and adverse costs. A prevailing claimant's attorney, however, can claim its fee based on the original amount in dispute. The German legislator did not fear abusive behaviour, since the application is subject to the court's approval.<sup>70</sup>

The attorney's basic fee that is calculated upon the amount in dispute can subsequently be multiplied by two fee factors (a multiplier): one for (preparing) litigation (*Verfahrensgebühr*), such as written statements, and one in case a hearing has taken place (*Terminsgebühr*).<sup>71</sup> Both multipliers range from

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<sup>62</sup> § 29(1) GKG.

<sup>63</sup> Hess & Hübner 2010, p. 361.

<sup>64</sup> Wagner 2010, p. 156.

<sup>65</sup> For court charges, see § 3 and 34 GKG and Appendix 1 (*Kostenverzeichnis, KV*) and 2 (*Gebührentabelle*). For attorney fees, see § 2 and 13 RVG and Appendix 1 (*Vergütungsverzeichnis*) and 2 (*Gebührentabelle*). Some exceptions apply for extrajudicial services and specific procedures; see hereafter and section 4.2. The scales were last amended in 2013; before then, they were amended in 2004 and 1994; see Deutscher Bundestag, *Entwurf Kostenrechtsmodernisierungsgesetz*, Drucksache 15/1971, 11.11.2003, and Deutscher Bundestag, *Entwurf Zweites Kostenrechtsmodernisierungsgesetz*, Drucksache 17/11471, 14.11.2012.

<sup>66</sup> § 3 and 4(1) ZPO. See also Wagner 2010, p. 151-152.

<sup>67</sup> § 39(2) GKG and § 22(2) RVG.

<sup>68</sup> § 48(1) GKG. See also Wagner 2010, p. 151, with further references. Other exceptions within the context of collective redress will be addressed in section 4.5.

<sup>69</sup> § 89a of the Act against Restraints on Competition, GWB; § 12 of the Act against Unfair Competition, UWG.

<sup>70</sup> Deutscher Bundestag, *Gesetzentwurf der Bundesregierung, Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*, Drucksache 15/3640, 12.08.2004, p. 18 and 69.

<sup>71</sup> Appendix 1, Part 3 to § 2(2) RVG (*Vergütungsverzeichnis, VV*)

0.3 to 3. Their weight depends on the type of case and its specific features. In standard litigation, the *Verfahrensgebühr* is 1.3 and the *Terminsgebühr* is 1.2.<sup>72</sup> Thus, in such litigation the basic fee is multiplied by 2.5. If the proceedings end with an amicable settlement, an additional multiplier of 1.0-1.5 is awarded for the recoverable attorney fees (*Einigungsgebühr*).<sup>73</sup> Moreover, in order to incentivize such a settlement, the court fee is reduced.<sup>74</sup>

The aim of the German costs system is to promote both the predictability of costs and the pursuit of small claims by way of cross-subsidization.<sup>75</sup> To illustrate this, Table V shows the cost risk in six cases before a court of first instance,<sup>76</sup> with varying amounts in dispute, for proceedings in which a hearing took place (multiplier 2.5).<sup>77</sup>

	€ 3,000	€ 30,000	€ 300,000	€ 3,000,000	€ 30,000,000	€ 300,000,000
<b>Court fee</b>	324	1,218	7,386	37,608	329,208	329,208
<b>Own attorney's fee</b>	622	2,591	7,440	31,895	272,870	272,870
<b>Opponent's attorney fee</b>	622	2,591	7,440	31,895	272,870	272,870
<b>Total</b>	1,568	6,400	22,266	101,398	874,948	874,948

Table V: A claimant's cost risk in six categories of claim value

As the table illustrates, court charges and attorney's fees are relatively low for small claims. They are subsidized by high-value claims. However, the increase is regressive: as a percentage of the claim value, the costs increasingly diminish.

As mentioned, the own attorney fees may deviate from the statutory fees. However, to protect the system of cross-subsidization and the attorneys' task of promoting an independent administration of justice, an attorney is not allowed to agree to a *lower* fee than the statutory one for court proceedings.<sup>78</sup> A lower fee is allowed for extrajudicial activities.<sup>79</sup> Attorneys and clients are allowed to negotiate a *higher* fee, but such a fee is not necessarily recoverable in the case of success.<sup>80</sup> Higher, hourly

<sup>72</sup> Pursuant to nos. 3100 and 3104 VV. See also Deutscher Bundestag, *Entwurf Kostenrechtsmodernisierungsgesetz*, Drucksache 15/1971, 11.11.2003, p. 144 and 147.

<sup>73</sup> Pursuant to nos. 1000-1004 VV.

<sup>74</sup> Pursuant to no. 1211 KV.

<sup>75</sup> Hess & Hübner 2010, p. 352-353.

<sup>76</sup> The fees for appellate proceedings are higher than for those before a court of first instance.

<sup>77</sup> Calculated with the online tool of the German Bar Association (*DAV-Prozesskostenrechner*), see <anwaltverein.de/de/service/prozesskostenrechner>. Included are the court fees, the attorney fees, a fixed reimbursement of € 20 for expenses (*Auslagen*) pursuant to nos. 7001 and 7002 VV, and 19% VAT.

<sup>78</sup> § 49b(1) BRAO.

<sup>79</sup> § 4(1) RVG; see section 4.2 and hereafter.

<sup>80</sup> See section 4.3.4.

fees are said to be common in complex litigation where the expertise of a specialized attorney is necessary, such as competition law and commercial litigation.<sup>81</sup> Wagner has attributed this empirical observation to the weak incentives for attorneys to work hard for a successful outcome, since they earn their fees at an early stage of the proceedings and the fees remain unaffected by further activities; ‘sophisticated parties think that the incentives created by hourly payments are worth their price.’<sup>82</sup>

For extrajudicial activities, the RVG scales might also not apply. Three types of such activities can be distinguished: basic legal advice, mediation and the enforcement of a claim. For basic legal advice or mediation, clients and attorneys are free to negotiate a reasonable consulting fee (*Beratungsgebühr*).<sup>83</sup> For further extrajudicial (enforcement) activities, the statutorily fixed business fee (*Geschäftsgebühr*) applies, which can be based on the amount in dispute.<sup>84</sup> A lower fee is allowed as well, as long as it bears a reasonable relation to the services provided.<sup>85</sup> If basic legal advice is followed by further consultation on the same issue, the consulting fee is deducted from the business fee.<sup>86</sup> If enforcement activities result in court proceedings, 50-75% of the business fee is deducted from the court fees.<sup>87</sup> This deduction only applies to a party’s *own* attorney’s fees; in the case of success, the full statutory fee that is linked to the court proceedings can be recovered from the opponent.<sup>88</sup>

#### 4.3.3 Security for costs

Civil procedure rules allow defendants to apply for the claimant to provide security for costs, that is, for a potential costs order (*Prozesskostensicherheit*). The situations under which a court will make such an order are limited. The main reason to do so is if the claimant is an inhabitant of a non-EU jurisdiction that is not a party to a treaty prohibiting the provision of security for costs.<sup>89</sup> In effect, neither this provision nor the other exceptional situations in which such an order will be made<sup>90</sup> are relevant within the scope of this research.

Nevertheless, a particular entrepreneurial party that also litigates in Germany has recently started to provide security for costs to address a potential costs award in collective redress cases.<sup>91</sup> This measure should be seen in light of earlier case law in which the special purpose vehicle’s business model was dismissed. This will be further discussed in sections 4.4.4 and 4.5.5.2.

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<sup>81</sup> Wagner 2010, p. 168; Harte-Bavendam & Henning-Bodewig 2016, § 9, Rn. 124-125.

<sup>82</sup> Wagner 2010, p. 182.

<sup>83</sup> § 34 RVG.

<sup>84</sup> § 34 RVG and VV nos. 2300-2303.

<sup>85</sup> § 4(1) RVG.

<sup>86</sup> § 34(2) RVG.

<sup>87</sup> VV no. 3100, Vorbemerkung 3(4).

<sup>88</sup> § 15a(2) RVG. See also Wagner 2010, p. 155 and section 4.3.4.

<sup>89</sup> § 110(1) ZPO.

<sup>90</sup> See § 89(1), § 921(2) and § 936 ZPO.

<sup>91</sup> Stadler 2017, p. 208. See, similarly, section 6.3.3.

#### 4.3.4 Costs shifting

The German costs shifting rule (§ 91 ZPO) states that the losing party bears the opponent's litigation costs, including the attorney's statutory fees and expenses, insofar as the costs were necessary to enforce or defend a right. It is a full indemnity rule, that is, normally, all *statutory* costs are shifted.<sup>92</sup> If an attorney and client have agreed upon a higher fee than the statutory one or a contingency fee, generally the 'supplement' cannot be recovered from the opposing party in the case of success as part of the costs order.<sup>93</sup> The rationale for the costs shifting rule is the 'mere' initiation of unsuccessful litigation (*Veranlasserprinzip*); the payment of adverse costs is not considered to be a punishment or damages.<sup>94</sup>

There are a limited number of exceptions to the general costs shifting rule and judges have little room to deviate from this rule. The main exceptions are that no costs shifting applies in uncontested claims and in family law cases.<sup>95</sup> Furthermore, if each party partly loses and wins, the costs are balanced out or shared proportionally.<sup>96</sup> If the case is resolved by way of an amicable settlement, each party bears its own costs unless agreed otherwise.<sup>97</sup> Furthermore, regardless of the outcome of litigation, the court can order any party to reimburse the opponent's costs that have been incurred due to specific inefficient litigation conduct: failing to observe time limits or filing unsuccessful or unnecessary motions.<sup>98</sup> The latter exceptions are of marginal importance in practice.<sup>99</sup>

The court that has dealt with the case declares – ex officio – whether costs are to be shifted and, if so, which party bears the costs and, occasionally, for which proportion (*Kostengrundentscheidung*).<sup>100</sup> Except for court charges, the actual assessment of the necessary (*notwendige*) costs takes place in separate costs proceedings (*Kostenfestsetzungsverfahren*) before a court officer (*Rechtspfleger*) in the same court.<sup>101</sup> These proceedings are intended for the (procedural) assessment of costs only. Substantive claims, such as the invalidity of a power of attorney, need to be filed in separate proceedings, save uncontested claims or those of such simplicity that they can be addressed in the costs proceedings.<sup>102</sup> The criterion for assessing whether costs are necessary is whether a reasonable and efficient party (*verständige und wirtschaftlich vernünftige Partei*) would have incurred the costs – at that time – as

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<sup>92</sup> § 91 ZPO. See also section 4.3.2.

<sup>93</sup> See § 3a(1) RVG. See also hereafter, and sections 4.3.2, 4.3.5 and 4.4.2.

<sup>94</sup> Rosenberg, Schwab & Gottwald 2010, p. 448, Pohlman 2014, p. 379-380.

<sup>95</sup> § 93 ZPO and § 132, 150 and 183 *Familienverfahrgesetz*.

<sup>96</sup> § 92 ZPO.

<sup>97</sup> § 98 ZPO. See also § 91a ZPO.

<sup>98</sup> § 95 and § 96 ZPO.

<sup>99</sup> Wagner 2010, p. 166.

<sup>100</sup> § 308(2) ZPO. See also Rosenberg, Schwab & Gottwald 2010, p. 450-451.

<sup>101</sup> § 19 GKG, § 103-104 ZPO and § 21(1) *Rechtspflegergesetz*, RPflG. See in more detail Wagner 2010, p. 166-167.

<sup>102</sup> See BGH 22.11.2006, IV ZB 18/06, *NJW-RR* 2007, 422 and Schneider & Thiel 2016, at 'Materiell-rechtliche Einwände'. See also sections 4.3.5 and 4.3.6.

being relevant for resolving the case.<sup>103</sup> This leaves some room for discretion, albeit to a limited extent.<sup>104</sup>

A costs order should be seen as being independent from a potential claim for damages regarding litigation costs. Such claims, which require separate proceedings to be instigated, are relatively rare.<sup>105</sup> Once a costs order has been made it generally replaces a substantive claim.<sup>106</sup> Case-specific circumstances such as contractual obligations or tortious litigation conduct might dictate otherwise, but only if they have not yet been considered as part of the costs order:

*Zwar ist – wie in der Rechtsprechung des BGH anerkannt ist – eine prozessuale Kostenentscheidung nicht erschöpfend, sondern lässt grundsätzlich noch Raum für die Durchsetzung materiell-rechtlicher Ansprüche auf Kostenerstattung etwa aus Vertrag, wegen Verzugs oder aus unerlaubter Handlung. Dieser materiell-rechtliche Anspruch kann dabei je nach Sachlage neben die prozessuale Kostenregelung treten und ihr sogar entgegengerichtet sein, sofern zusätzliche Umstände hinzukommen, die bei der prozessualen Kostenentscheidung nicht berücksichtigt werden konnten. Bleibt hingegen der Sachverhalt, der zu einer abschließenden prozessualen Kostenentscheidung geführt hat, unverändert, geht es nicht an, nunmehr den gleichen Sachverhalt erneut zur Nachprüfung zu stellen und in seinen kostenrechtlichen Auswirkungen materiell-rechtlich entgegengesetzt zu beurteilen (...).*<sup>107</sup>

Extrajudicial costs that have been incurred to obtain payment, such as debt collection costs, or to determine damage or liability, such as an own expert report, are generally not shifted under the costs rules. They lack the necessary direct connection to the proceedings (*unmittelbaren Prozessbezogenheit*) and are considered to be a party's own responsibility:

*'Damit soll verhindert werden, dass eine Partei ihre allgemeinen Unkosten oder prozessfremde Kosten auf den Gegner abzuwälzen versucht und so den Prozess verteuert. Jede Partei hat grundsätzlich ihre Einstandspflicht und ihre Ersatzberechtigung in eigener Verantwortung zu prüfen und den dadurch entstehenden Aufwand selbst zu tragen.'*<sup>108</sup>

Such costs, however, remain potentially recoverable as damages under substantive law.<sup>109</sup> This also applies to attorney fees. As discussed in section 4.3.2, instead of the statutorily fixed fee, the attorney and client might negotiate a higher, hourly fee if the complexity of the case so requires and/or the client so desires. Costs incurred for litigation purposes that are claimed as damages need to be necessary and appropriate (*erforderlich und zweckmäßig*).<sup>110</sup> Literature and case law mention that this is the

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<sup>103</sup> See, for instance, BGH 1.2.2017, VII ZB 18/14, *NJW* 2017, 1397, para. 12.

<sup>104</sup> See also Hess & Hübner 2012, p. 153.

<sup>105</sup> Wagner 2010, p. 161 and 162.

<sup>106</sup> Rosenberg, Schwab & Gottwald 2010, p. 441, 447, Pohlmann 2014, p. 379-380.

<sup>107</sup> BGH 16.02.2011, VIII ZR 80/10, *NJW* 2011, 2368, para. 10.

<sup>108</sup> Thomas & Putzo 2005, § 91, Rn. 8 and 47-52, Schneider & Thiel 2016, at 'Inkassokosten' and 'Privatgutachten'. See, for instance, BGH 17.12.2002, VI ZB 56/02, *NJW* 2003, 1398 and BGH 18.11.2008, VI ZB 24/08, *BeckRS* 2008, 26028.

<sup>109</sup> § 249 ff. BGB and, for instance, § 823 BGB.

<sup>110</sup> See, for instance, BGH 8.11.1994, VI ZR 3/94, *NJW* 1995, 446; and BGH 10.01.2006, VI ZR 43/05, *NJW* 2006, 1065, at B, II, 1.

case if payment pursuant to the RVG scales is uncommon in a particular field of law and/or is unwarranted due to the complexity of the case.<sup>111</sup> It also includes an assessment of the reasonableness of the higher fee, which cannot be excessive (*unangemessen hoch*). If so, ‘*unter Berücksichtigung aller Umstände*’ the court can reduce it to the statutory fee.<sup>112</sup> Such a court assessment can also take place concerning an allegedly unreasonable contingency fee.<sup>113</sup> This brings me to the question of whether litigation *funding* costs are recoverable.

#### 4.3.5 Recovery of litigation funding costs

Successful claimants are generally unable to recover litigation funding costs from their opponent(s) as part of the costs order.<sup>114</sup> First of all given the statutory fixation of recoverable costs and fees, and the limited possibilities to deviate from the costs rules. Moreover, pursuant to the prevailing case law, the assessment of the necessity of such costs – such as interest payments on a loan – is too complex and thus not in accordance with the simplicity and practicability of costs proceedings.<sup>115</sup> Such an assessment would require, for instance, an assessment of the litigant’s income and financial means. Hence, litigation funding generally leaves the position of the opponent unaffected.<sup>116</sup> However, such costs might be recoverable as damages. As mentioned, the costs that have been incurred for the purpose of litigation can be awarded as damages if they were necessary and appropriate; this criterion applies to litigation funding costs as well.<sup>117</sup> Illustrative is a 2009 case before the district court of Aachen, where a claimant who had funded litigation by way of a litigation funder sought to recover as damages the contingency fee of over € 800,000. The district court dismissed the claim, since the claimant had not substantiated the necessity to enter into such an arrangement; that no alternatives were available such as personal funding, a loan or public legal aid.<sup>118</sup> If not, the court ruled, the costs of the funding arrangement should still be compared to those of the hypothetical alternative, such as (missed) interest and loan costs, and could not considerably exceed those costs:

*‘Ein Ersatz der Kosten des Prozessfinanzierers kommt nur dann in Betracht, wenn der Betrag der Erfolgsbeteiligung der Höhe nach die Kreditkosten oder die entgangenen Anlagezinsen jedenfalls nicht wesentlich übersteigt.’<sup>119</sup>*

The district court recognized the advantages of a litigation funding agreement, but did not consider them to be sufficiently persuasive to alter its judgment on the recoverability of the costs thereof.<sup>120</sup> To award the costs of pre-financing proceedings, including a potential adverse costs risk, would go

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<sup>111</sup> Harte-Bavendam & Henning-Bodewig 2016, § 9, Rn. 124-125. See, for instance, OLG Koblenz 29.5.2008, 2 U 1620/06, *NJW* 2009, 1153, and OLG München 30.6.2010, Az. 7 U 1879/10.

<sup>112</sup> § 3a(2) RVG.

<sup>113</sup> See also section 4.4.2.

<sup>114</sup> On litigation funding see also section 4.4.

<sup>115</sup> See, for instance, OLG Koblenz, 4.1.2006, 14 W 810/05, *NJW-RR* 2006, 502.

<sup>116</sup> Wagner 2010, p. 173, Schneider & Thiel 2016, at ‘Prozessfinanzierungskosten’.

<sup>117</sup> LG Aachen 22.12.2009, 10 O 277/09, *BeckRS* 2010, 28938.

<sup>118</sup> See, similarly, Harte-Bavendam & Henning-Bodewig 2016, § 9, Rn. 127.

<sup>119</sup> LG Aachen 22.12.2009, 10 O 277/09, *BeckRS* 2010, 28938, at I, 1, sub a.

<sup>120</sup> LG Aachen 22.12.2009, 10 O 277/09, *BeckRS* 2010, 28938, at I, 1, sub b.

against the restorative objective of damages. Costs rules do not include a consideration of fault; even if a claimant is publicly funded this does not (fully) cover the adverse costs risk. Moreover, recoverability would exceed the compensation of a pure economic loss, since it includes the funder's potential economic gain. In short, the criteria for recoverability are not easily met when it comes to litigation funding costs.

Searching for and arranging litigation funding might be costly. Normally, a third-party funder will reimburse the attorney for such additional costs, yet the claimant will probably be the one to eventually bear those costs.<sup>121</sup>

#### 4.3.6 Liability for adverse costs

A costs order is made against a litigant. This is based upon the principle that the litigant has incited (unsuccessful) litigation (*Veranlasserprinzip*).<sup>122</sup> Liability for adverse costs is generally not subject to other conditions, such as a claimant's capacity to litigate.<sup>123</sup> However, an attorney can be held liable for unnecessary litigation expenses if he is or should have been aware of the invalidity of his power of attorney to litigate (*Prozessvollmacht*).<sup>124</sup> The aforementioned principle might lead to third-party liability for litigation costs, if the third party is the one that has actually incited the proceedings and the litigant is non-existent or invalidly represented.<sup>125</sup> However, a costs order will not be made against a third party that has 'merely' agreed to pay the (adverse) litigation costs, as it is not party to the proceedings.<sup>126</sup> Hence, such third-party liability for litigation costs would require a separate claim for damages.<sup>127</sup> In some cases it could nevertheless be argued that a claim-scouting entrepreneurial party is the one who has incited litigation and thus is liable for the costs order as well.<sup>128</sup> Insofar as I have been able to ascertain, no such case law exists.<sup>129</sup>

If parties are joined and they are represented by the same legal representative, the court can either state the individual's proportional liability in the costs order, or hold them jointly liable (*Gesamtschuldner*), regardless of their internal individual liability.<sup>130</sup> For mass litigation cases, for instance KapMuG, divergent rules might apply. These will be further discussed in section 4.5.

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<sup>121</sup> Pursuant to VV no. 2300; see Heussen & Hamm 2016, § 54, Rn. 249.

<sup>122</sup> See also section 4.3.4.

<sup>123</sup> BGH 04.03.1993, V ZB 5/93, *NJW* 1993, 1865; see Thomas & Putzo 2005, § 91, Rn. 2.

<sup>124</sup> § 88 and 89 ZPO; see Thomas & Putzo 2005, § 89, Rn. 5; Rosenberg, Schwab & Gottwald 2010, p. 441 and 446; and, for instance, BGH 26.11.1953, IV ZR 127/53, *BeckRS* 1953, 31373538 and BGH 18.11.1982, III ZR 113/79, *NJW* 1983, 883.

<sup>125</sup> See, for instance, BGH 29.1.2001, II ZR 331/00, *NJW* 2001, 1056, at A, II, 4.

<sup>126</sup> Rosenberg, Schwab & Gottwald 2010, p. 446, referring to old case law (1953).

<sup>127</sup> See, similarly, Schmidt 2001, p. 999-1000, on the liability of a partner (*Gesellschafter*) for a costs order against a partnership.

<sup>128</sup> See section 5.3.6.2.

<sup>129</sup> See section 4.4.3.

<sup>130</sup> § 100 ZPO. See also Haag & Geigel 2015, Kap. 41, Rn. 31-39.

## 4.4 Private litigation funding

### 4.4.1 Introduction

Traditionally, litigants are themselves responsible for obtaining the necessary funds for litigation.<sup>131</sup> However, parties with limited financial means can request the court to assess their eligibility for legal aid (*Prozesskostenhilfe*).<sup>132</sup> If a party's personal and economic circumstances impede access to justice, and the court deems the claim to be reasonable and not frivolous, it will grant publicly funded legal aid. The fact that the court undertakes this assessment has sometimes led to abusive behaviour by parties trying to obtain information on the quality of their claim and the prospect of success.<sup>133</sup> Public legal aid funding entails that the claimant is – temporarily or permanently – freed from paying court charges and attorney fees.<sup>134</sup> Furthermore, the attorney's fees are reduced, and initially the state is responsible for the payment thereof.<sup>135</sup> The reduction of the attorney fees has disincentivised attorneys to accept such cases, although they are obliged to do so,<sup>136</sup> and this is said to at least provide a strong incentive to look for alternative funding sources.<sup>137</sup> As legal aid does not cover a potential costs order, a litigation risk remains.

A party is not eligible for legal aid if it has taken out a legal expenses insurance.<sup>138</sup> As mentioned, a large percentage of German households have taken out legal expenses insurance.<sup>139</sup> Due to the predictability of the German cost and costs shifting system, insurers are capable of gauging their risks and they therefore offer coverage for legal expenses at reasonable rates.<sup>140</sup> For this reason, in combination with a culture of risk-avoidance,<sup>141</sup> before-the-event legal expenses insurance is a very popular instrument to minimize the litigation cost risk. However, such insurance is not available for commercial litigation,<sup>142</sup> and in the aftermath of the Telekom case (a KapMuG proceedings) insurers have now also excluded investments or securities litigation.<sup>143</sup> Complaints are said to have arisen from the judiciary, stating that the high level of insurance has led to a litigation explosion and frivolous claims, but the

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<sup>131</sup> Hess & Hübner 2010, p. 349.

<sup>132</sup> § 114-127a ZPO.

<sup>133</sup> FRA report 'Access to justice in Europe: an overview of challenges and opportunities', national report Germany, available at <[fra.europa.eu/sites/default/files/fra\\_uploads/1526-access-to-justice-2011-country-DE.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1526-access-to-justice-2011-country-DE.pdf)>, p. 11.

<sup>134</sup> § 122(1) ZPO.

<sup>135</sup> § 122(1) ZPO and § 49 RVG.

<sup>136</sup> § 48(1) BRAO.

<sup>137</sup> Hess & Hübner 2010, p. 356.

<sup>138</sup> Rosenberg, Schwab & Gottwald 2010, p. 468.

<sup>139</sup> Faure, Hartlief & Philipsen 2006, p. 55, Hess & Hübner 2012, p. 158, and Hodges, Peysner & Nurse 2012, p. 39, refer to data stemming from 2006, when more than 40% of German households had taken out a legal expenses insurance. Winter e.a. 2015, p. 57, refer to a publication from 2010 with a similar percentage. More recent information is unknown to the author.

<sup>140</sup> Murray & Stürner 2004, p. 11, Wagner 2010, p. 171-172 and 180.

<sup>141</sup> Winter e.a. 2015, p. 60, whose conclusion is based on interviews with key players in the legal services and insurance market.

<sup>142</sup> Stadler 2017, p. 201. See also BGH 21.5.2003, IV ZR 327/02, *N/W* 2003, 2384.

<sup>143</sup> Rotter 2011, p. 443, Halfmeier 2016, p. 295. See also section 4.5.4.



tenability of this statement has not been empirically tested.<sup>144</sup> After-the-event insurance seems to be absent in the German insurance market.<sup>145</sup>

In spite of the relatively large role of legal expenses insurance, other types of private litigation funding have emerged. Currently, the following arrangements are available, which will be discussed in the following sections: contingency fees, third-party litigation funding, and the assignment model.

#### 4.4.2 Attorney litigation funding

Generally, German attorneys are not allowed to operate under a contingency fee arrangement, as it would generate perverse incentives, thereby conflicting with attorneys' independence.<sup>146</sup> However, from 2008, the ban has been lifted in strictly limited circumstances. The relaxation followed a 2006 judgment by the Constitutional Court, ruling that the ban on contingency fees violated the constitutional right to occupational freedom, in conjunction with the right to have access to justice as derived from the German Constitution.<sup>147</sup> This ruling led to a legislative amendment, pursuant to which attorneys are now allowed to provide legal services under a result-based remuneration (*Erfolgshonorar*).<sup>148</sup> However, this is only allowed (*'nur für den Einzelfall und nur dann'*) in the situation where a party's financial situation is impaired in such way that, without this type of remuneration and under reasonable consideration (*'bei verständiger Betrachtung'*), he would be unable to pursue his claim.

Contrary to third-party litigation funders (see section 4.4.3), the attorney cannot shoulder the full litigation risk. The arrangement can only cover the attorney's fees, not the court fees, the expert's fees (*'Kosten anderer Beteiligter'*) or other expenses.<sup>149</sup> The attorney's remuneration can deviate from the statutorily fixed minimum fee in various ways. For instance, in the case of success, the fee can consist of a percentage of the proceeds, but it can also be constructed as a success fee (*'no win, less fee'*).<sup>150</sup> The court's discretionary power to reduce an agreed fee if its amount is inappropriate (*unangemessen hoch*) also applies to the contingency fee.<sup>151</sup>

The fear of 'American situations' is noticeable in the government's solution.<sup>152</sup> The legislator was rather reluctant to pass the amendment and the scope of the solution demonstrates this. In the words of Blattner, it is a *'kleine Lösung'* for the constitutionally problematic ban on contingency fees.<sup>153</sup> It is

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<sup>144</sup> Hess & Hübner 2012, p. 159.

<sup>145</sup> Jaskolla 2004, p. 156 and Hess & Hübner 2010, p. 359

<sup>146</sup> § 49b(2) BRAO, § 1 BRAO; Wagner 2010, p. 169. See also, for instance, BGH 23.4.2009, IX ZR 167/07, *NJW* 2009, 3297.

<sup>147</sup> BVerG 12.12.2006, 1 BvR 2576/04, *NJW* 2007, 979. § 12 GG (occupational freedom) and § 2(1), 3(1) and 20(3) GG (from which the right to have access to justice is derived).

<sup>148</sup> § 4a(1) RVG.

<sup>149</sup> § 49b(2) BRAO and § 4a(3) RVG. See also Deutscher Bundestag, *Entwurf Erfolgshonoraren*, Drucksache 16/8384, 05.03.2008, p. 9.

<sup>150</sup> Deutscher Bundestag, *Entwurf Erfolgshonoraren*, Drucksache 16/8384, 05.03.2008, p. 10-11.

<sup>151</sup> § 3a(2) RVG. See section 4.3.2.

<sup>152</sup> Hess & Hübner 2010, p. 355.

<sup>153</sup> Blattner 2012, p. 571.

thus not surprising that, so far, not many parties have made use of this type of funding.<sup>154</sup> The limited aim and scope of the rule and its circumspectly formulated conditions are open to interpretation, and the inherent insecurity and potential risk of nullification have not yet incentivized many to engage in this type of arrangement.

#### 4.4.3 Third-party litigation funding

From the early 2000s onwards, third-party litigation funding has occupied a part of the German litigation funding market, evolving from or as a 'natural extension' to the legal expenses insurance market.<sup>155</sup> It is a fairly modest part, though; a 2007 study showed that between 0.2%-0.8% of litigation was funded by third-party litigation funders, as opposed to 35% by way of (before-the-event) legal expenses insurance.<sup>156</sup> The annual statistical yearbook on attorneys addresses the main types of litigation funding (self-funding, public legal aid and legal expenses insurance); data on third-party litigation funding are not collected given its modest market share.<sup>157</sup>

Litigation funding is nevertheless recognized as a means to promote access to justice.<sup>158</sup> The first litigation funder, Foris AG, started in 1998 and has remained one of the market leaders.<sup>159</sup> Currently, the other two key players are Legial AG and Roland Prozessfinanz. Together, the three of them are said to take up around 90% of the third-party litigation funding market.<sup>160</sup> They usually operate in commercial litigation, with its high-value cases and the lack of competition from legal expenses insurance.<sup>161</sup> Nevertheless, some funders take up smaller claims as well, involving those claimants that are not eligible for legal aid or a contingency arrangement, have not taken out a legal expenses insurance, and/or want to avoid all cost risks, including a potential costs order. The most recent overview provided by the *Anwaltsverein* (September 2014) lists 17 litigation funders, some of which have a low minimum threshold as to the required amount in dispute (€ 150 to € 10,000).<sup>162</sup> Such low amounts imply that these funders operate in the collective redress market. Some indeed do. For instance, one of the listed funders pools low-value consumer claims that consumers have transferred to the funder, and pursues the aggregated claims in its own name.<sup>163</sup> In the case of success, the participating consumers recover 67% of the individual proceeds. As this construction is based on an assignment to a special purpose vehicle for the purpose of obtaining collective redress, it differs from the 'general' third-party litigation

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<sup>154</sup> Blattner 2012, p. 562 and 571, Stadler 2017, p. 201.

<sup>155</sup> Hodges, Peysner & Nurse 2012, p. 39 and 40. On the early developments, see Fritzsche & Schmidt 1999 and Bruns 2000.

<sup>156</sup> Hommerich & Kilian 2007.

<sup>157</sup> See Kilian & Dreske 2016, Chapter 7.

<sup>158</sup> And promoted as such, see, for instance, the German Bar Association DAV's free publication on litigation funding, available at <[www.anwaltverlag.de/prozessfinanzierung](http://www.anwaltverlag.de/prozessfinanzierung)>.

<sup>159</sup> See <[foris.de](http://foris.de)>. See also Homberg 2006, p. 39, Coester & Nitzsche 2005, p. 101, and De Morpurgo 2014, p. 27.

<sup>160</sup> Eversberg 2016, p. 31.

<sup>161</sup> Van Boom 2011, p. 34, Demougin & Maultzsch 2014, p. 527.

<sup>162</sup> The overview (September 2014) is available at <[anwaltsverein.de/files/anwaltsverein.de/downloads/praxis/Vergue-tungsrecht/Uebersicht%20Prozessfinanzierer-Stand%2029%2009%2014.pdf](http://anwaltsverein.de/files/anwaltsverein.de/downloads/praxis/Vergue-tungsrecht/Uebersicht%20Prozessfinanzierer-Stand%2029%2009%2014.pdf)>; see, similar, the overview provided by Kallenbach 2010, p. 353.

<sup>163</sup> See [metaclaims.de](http://metaclaims.de).

funding contract (*Prozessfinanzierungsvertrag*). I will further discuss this variation of entrepreneurial mass litigation in sections 4.4.4 and 4.5.5.2.

As for the percentages charged, there is little case law. According to Jaskolla, due to competition, the percentages of litigation funders mainly vary between 20 and 30%.<sup>164</sup> In practice, according to Eversberg, a rule of thumb applies for funders that a percentage of 50% is safe, anything higher would probably go against public policy.<sup>165</sup> Furthermore, all funders are said to provide for a veto right in respect of settlements, and share 'the general conception of themselves as being more than just a cash provider and the preference for taking on an advisory role during the funding process.'<sup>166</sup>

As mentioned in section 4.2, the contract between a commercial litigation funder and a claimant is generally qualified as a contract *sui generis* or as a contract of undisclosed partnership (*Gesellschaftsvertrag*, the partnership is further qualified as *Gelegenheitsgesellschaft* and *Innengesellschaft*), depending on the specific contract.<sup>167</sup> In the latter situation, both the funder and the claimant contribute to the partnership: the claimant through his claim, and the funder with its wallet to pursue the said claim and cover a potential costs order. The claimant and funder remain the owners of their respective assets (claim and financial means); these are not transferred to the partnership.<sup>168</sup> The partnership does not publicly act as such, this is undisclosed. Normally, parties will additionally stipulate a confidentiality agreement to avoid disclosing the funder's presence.<sup>169</sup> The claimant pursues the claim in his own name, and the funder remains in the background. The claimant and the funder, however, have a joint aim and a matching interest: to enforce and capitalize – the potential value of – the claim.<sup>170</sup> This construction affords certain rights and imposes certain obligations on both parties.<sup>171</sup> The claimant is required to (allow his attorney to) provide the funder with information and to deliberate on litigation strategies and decisions (see hereafter). At the same time, the claimant secures the financial means to pursue the claim, and is covered against the risk of losing or an insolvent defendant (as to the litigation costs). However, these obligations for the funder apply only in the internal construct. Externally, only the claimant is liable, for instance, for adverse costs; not the funder, nor the partnership. The insolvency of the funder thus mainly creates a risk for the claimant, less so for the defendant.

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<sup>164</sup> Jaskolla 2004, p. 77.

<sup>165</sup> Referring to the decision of the Munich Court of Appeal that a share of 50% was justified in a case where the funder had stepped in after the case at first instance had already been lost.

<sup>166</sup> Eversberg 2016, p. 29.

<sup>167</sup> Cf. § 705 ff. BGB. See Jaskolla 2004, p. 62 ff and 71, referring to, inter alia, a 1999 decision of – a predecessor of – the BaFin (p. 63), Homberg 2006, p. 110 ff and 120, Rosenberg, Schwab & Gottwald 2010, p. 466, Langheid & Wandt 2016, § 1, Rn. 109, Heussen & Hamm 2016, § 54, Rn. 248, Van Boom 2017, p. 15-16, all with further references. See, opposed to the qualification as *Gesellschaft*, Bruns 2000, p. 238.

<sup>168</sup> Homberg 2006, p. 111-112. The claimant can assign the claim to the funder for security purposes, after which the funder authorizes the claimant to bring the claim in his own name on the funder's behalf (*Gewillkürte Prozessstandschaft*); see Coester & Nitzsche 2005, p. 90. See also sections 4.4.4 and 4.5.5.2, in which the assignment model will be discussed.

<sup>169</sup> Coester & Nitzsche 2005, p. 91, and Eversberg 2016

<sup>170</sup> See, differently, Bruns 2000, p. 238.

<sup>171</sup> See Jaskolla 2004, p. 68-74, Homberg 2006, p. 120 ff, Coester & Nitzsche 2005, p. 90-94, Rosenberg, Schwab & Gottwald 2010, p. 466.

A third-party funder will only engage in a case after a thorough assessment of the chances of success and the credit-worthiness of the defendant.<sup>172</sup> Much like insurers, third-party litigation funders are aided by the German costs (shifting) system, which enables them to accurately calculate the cost (risks) of litigation.<sup>173</sup> However, although the case law on the topic is scarce, some complications might arise as to (the permissibility of) third-party litigation funding agreements. First, it might go against the prohibition on contingency fees if an attorney is involved in such a contract.<sup>174</sup> In 2012, the Munich Court of Appeal deemed the (indirect) involvement of an attorney in a litigation funding agreement to be invalid, as it had circumvented the contingency fee ban:

*Auch wenn Rechtsanwälte mehrheitlich an einer Gesellschaft beteiligt sind, die die Prozessführung ihrer eigenen Mandantschaft finanziert, besteht in gleicher Weise die Gefahr, dass die Rechtsverfolgung in einer mit der Stellung als Organ der Rechtspflege unvereinbaren Weise primär aus wirtschaftlichen Interessen betrieben wird.*<sup>175</sup>

Second, the strictly regulated legal services market as discussed in section 4.2 can put a spanner in the works, as the funder is not allowed to provide legal advice. This explains why third-party funders are not actively involved in litigation or do not interfere with the choice of lawyer.<sup>176</sup> Another reason that they do not interfere with the choice of lawyer is that they depend on the lawyer's referral of cases; replacing them with another lawyer would irreparably harm a funder's business. Nevertheless, as mentioned, a contract between a funder and a claimant will most likely stipulate that the funder is allowed to deliberate on litigation strategies and decisions.<sup>177</sup> In literature and case law this has been recognized as an advantage, also for attorneys.<sup>178</sup> A funder's level of control might be most robust in the situation in which a claimant has assigned its claim to the funder which allows the latter to assert the claim(s) in its own name – as mentioned, such a construction will be discussed in sections 4.4.4 and 4.5.5. A related issue that has not yet been dealt with in a court of law is the disclosure of a third-party funder's presence. There is no legal obligation to do so and, as mentioned, the claimant and funder will not normally voluntarily disclose the latter's involvement. This might be different if disclosure is advantageous, such as in settlement negotiations.<sup>179</sup> Stadler has argued that for collective redress, in light of the European Commission's Recommendation, an obligation to disclose a funder's presence should be implemented.<sup>180</sup> She deems disclosure to be necessary in order for courts to assess whether the funder has any (undue) influence over the claimant's litigation decisions. Given the defendant's

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<sup>172</sup> Homberg, p. 2, 19 ff.

<sup>173</sup> Wagner 2010, p. 173 and 180.

<sup>174</sup> See section 4.4.2.

<sup>175</sup> OLG München 10.05.2012, 23 U 4635/11, NJW 2012, 2207, at 1.1.2.

<sup>176</sup> Hodges, Peysner & Nurse 2012, p. 40.

<sup>177</sup> Eversberg 2016, at 6-10.

<sup>178</sup> See Heussen & Hamm 2016, § 54, Rn. 237 and LG Aachen 22.12.2009, 10 O 277/09, BeckRS 2010, 28938, at I, 1, sub b.

<sup>179</sup> Eversberg 2016, at 19 and 22.

<sup>180</sup> Principles 4 and 16 of Recommendation 2013/396/EU. See Stadler 2017, p. 215-216.

potential abusive behaviour, however, she deems it to be reasonable that the details of the arrangement should only be disclosed if necessary, and if so, to the court only.

#### 4.4.4 Special purpose vehicles: the assignment model

As mentioned in the previous section, some parties fund litigation by way of having aggrieved parties' claims assigned to them. Such a special purpose vehicle (*Rechtsverfolgungsgesellschaft*) then pursues similar, pooled claims in its own name, and in the case of success, the aggrieved parties are reimbursed with a percentage of the proceeds. Hence, such a construct resembles a contingency fee. In addition to consumer associations and a group of aggrieved parties, entrepreneurial third parties can establish such a vehicle. They have employed the assignment model in practice as a way to obtain collective redress, and as such the different types will be discussed in section 4.5.5. Here, I will discuss the conditions under which a third party can enforce the claims of other persons. A special purpose vehicle might take the shape of different legal entities.<sup>181</sup> However, regardless of its type, it is questionable whether it can pursue (bundled) assigned claims in its own name. This relates in particular to a party's capacity to sue (who can bring other persons' claims), and the restrictions on the alienability of a claim. In Germany, these rules reflect the strict regulation of the legal services market and the fundamental principle that civil justice should serve the protection of individual rights.<sup>182</sup>

Normally, only a person whose individual rights are at stake has standing to bring the ensuing claim (*Prozessführungsbefugnis*). Only by way of regulated exceptions can a third party enforce such a right in its own name. First, a third party can enforce a claim in its own name on behalf of the owner of the actual claim. This needs to be based on specific legislation (*gesetzliche Prozessstandschaft*), or on an agreement between the third party and owner of the claim (*gewillkürte Prozessstandschaft*). An example of the former is the administrator that litigates on behalf of a bankrupt party.<sup>183</sup> An example of the latter is a debt collection mandate (*Einziehungsermächtigung*), with which the capacity to sue follows from the transfer of the right of action from the claim owner to a third party that has an own interest which is worthy of protection (*schutzwürdiges Eigeninteresse*).<sup>184</sup> It is a – strictly regulated and rather complex – exception to the principle that a party should bring its claim *pro se*. In both cases, the third party litigates in its own name but has to make clear that it is not enforcing its own right.<sup>185</sup>

An alternative route to pursue the claim of another person – which avoids the aforementioned procedural requirements – is by way of assignment (*Abtretung*), which is possible under the German law of

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<sup>181</sup> Mann 2013, p. 765, distinguishes a *BGB-Gesellschaft*, an *offene Handelsgesellschaft* (oHG) or a *Gesellschaft mit beschränkter Haftung* (GmbH).

<sup>182</sup> As discussed in sections 4.1 and 4.2.

<sup>183</sup> § 80(1) Insolvenzordnung.

<sup>184</sup> Pursuant to § 362(2) and 185(1) BGB. On the difference with assignment, see LG Düsseldorf 17.12.2013, 37 O 200/09 (Kart.) U, Rn. 72-81. See also Domej 2014, p. 280, Pohlmann 2014, p. 109 ff, and Stadler 2014, p. 615 ff, with further references.

<sup>185</sup> Rosenberg, Schwab & Gottwald 2010, p. 227.

obligations.<sup>186</sup> A third party may take the place of the original creditor by contract, and with the transfer of the right steps into the shoes of the previous creditor as the new claim owner. It can then assert an own right on its own behalf, regardless of whether the assignment is full (*Vollabtretung*) or has been entered into for the purpose of commercial collection (*Inkassoession*), including by way of bringing the claim before the court. However, additional rules apply for the latter construction, the *Inkassoession*. The enforcement of a ‘foreign’ claim (*fremde Forderung*) for commercial purposes, where the original claim owner retains an economic interest in the claim, is restricted to those who have been authorized to provide legal services under the Legal Services Act (RDG).<sup>187</sup> The transfer of a claim to an unauthorized party is considered void.<sup>188</sup>

The conditions for a party’s capacity to sue are assessed in the admissibility phase of litigation. When a claim is brought before the court, it will first examine whether the procedural requirements to bring the claim are met. This examination of admissibility (*Zulässigkeit der Klage*) is conducted before and separated from the assessment of the merits of the case (*Begründetheit der Klage*).<sup>189</sup> Matters of admissibility are subdivided into various prerequisites for suing (*Prozessvoraussetzungen*), including parties’ competence to litigate (*Prozessführungsbefugnis*). The court assesses these requirements ex officio, and if a party is not able to meet them, the claim will be dismissed on procedural grounds.<sup>190</sup> A third party’s competence to litigate should be distinguished from any substantive restrictions to a claimant’s position, such as a non-existing right of the claim owner (*Aktivlegitimation*). Such substantive matters are not assessed at the admissibility stage.<sup>191</sup> In short, the recognition of standing is not necessarily equivalent to recognition of a right.<sup>192</sup>

Within the context of this research, the relevant types of authorized persons to provide legal services under the Legal Services Act are the following. First, publicly funded consumer associations are allowed to provide legal services (*Rechtsdienstleistungen*), including debt collection services (*Inkassodienstleistungen*), as long as this service is deemed necessary to protect consumers.<sup>193</sup> This includes the enforcement of consumer claims for damages by way of assignment, either by bringing a test case (*Musterverfahren*) or by bundling the assigned claims for damages into one action (*Sammelklage*).<sup>194</sup> In addition, a registered third party can collect claims for commercial purposes.<sup>195</sup> In order to be reg-

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<sup>186</sup> Pursuant to § 398 BGB. A claim may not be assigned if the performance cannot be made to a person other than the original creditor without a change of its contents, or if the transferability is excluded by an agreement between the original parties; § 399 BGB.

<sup>187</sup> § 2(1) and § 10(1)(1) RDG. See also Hess & Hübner 2010, p. 360, and Van Boom 2011, p. 34.

<sup>188</sup> § 134 BGB and § 3 RDG.

<sup>189</sup> Even when a claim is manifestly ill-founded; see Pohlmann 2014, p. 82, with further references.

<sup>190</sup> See Pohlmann 2014, p. 82 and Murray & Stürner 2004, p. 231.

<sup>191</sup> Rosenberg, Schwab & Gottwald 2010, § 46 (I) (2).

<sup>192</sup> On the problems this can cause, such as the duration of litigation, see section 4.5.5.2.

<sup>193</sup> § 8(1)(4) RDG and § 79 ZPO. See Micklitz 2007, p. 13-14, and Stadler 2010, p. 82.

<sup>194</sup> See also sections 4.2, 4.5.2 and 4.5.5.

<sup>195</sup> Pursuant to § 10(1)(1) RDG. Pursuant to this section, the Ministry of Justice has the authority to further regulate the details of the application procedure, which it has done by way of the Legal Services Ordinance (*Rechtsdienstleistungsverordnung*, RDV).

istered, it needs to be adequate, trustworthy, competent/professional, and have professional indemnity insurance.<sup>196</sup> Specific requirements can be attached to the registration, and the third party is required to transfer proceeds that are destined for the original claim owner as soon as possible, or to place them in a trust account.

## **4.5 Relevant rules and features of the collective redress mechanisms**

### **4.5.1 Briefly brushing up**

In section 2.2.2, the German mechanisms of collective redress were introduced, save for the assignment model that was introduced in the previous section and will be further discussed hereafter.

As will be clear by now, the hesitance towards collective redress is rather strong in Germany. Nevertheless, there are a number of routes along which collective redress can be obtained. To reiterate, Germany does not (yet) have a general mechanism specifically designed to obtain collective redress. The statutory instruments are sectoral and are dispersed among various laws. With regard to consumer and competition law, designated entities (such as *Verbände*) can provide for injunctive relief, recover ill-gotten gains, or pool assigned claims after an infringement of consumer law. With the KapMuG, harmed investors can obtain compensatory collective redress in the area of securities law. Furthermore, in practice, another – general – mechanism has been developed: the bundling of assigned claims and the pursuit thereof by a special purpose vehicle (*Prozess- or Rechtsverfolgungsgesellschaft*).

In the following sections, I will further address these routes and their elements that affect the participation and contribution of entrepreneurial parties. I have categorized the routes as follows:

- i) traditional group action & a test case (section 4.5.2): joinder (*Streitgenossenschaft*), consolidation (*Verfahrensverbindung*), and a test case (*Musterklage*);
- ii) representative action (section 4.5.3): action for injunction (*Unterlassungsklage*), and action for skimming-off illicit gains (*Gewinnabschöpfungsklage*);
- iii) specific group action/test case (section 4.5.4): model proceedings (*KapMuG*);
- iv) bundled assigned claims (section 4.5.5): *Einziehungsklage* and *Rechtsverfolgungsgesellschaft*.

I will not further address the draft legislative proposal of July 2017 for a model proceedings (*Musterfeststellungsklage*) for infringements of consumer law, as it is still a draft.<sup>197</sup> Although the design is somewhat similar to that of the KapMuG, the likelihood of the involvement of entrepreneurial parties is uncertain, since only designated (non-entrepreneurial) entities have the right to bring such action.

### **4.5.2 Joinder, consolidation and a test case**

As in most European jurisdictions, parties can jointly bring their individual, similar claims to court in one lawsuit (*Streitgenossenschaft*, § 59-60 ZPO), or the court may consolidate proceedings if various separate actions deal with the same legal and factual issues (*Verfahrensverbindung*, § 147 ZPO).<sup>198</sup> The

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<sup>196</sup> § 12(1) RDG and § 2, 3 and 5 RDV.

<sup>197</sup> See section 2.2.2.

<sup>198</sup> On these ‘traditional’ types of bundling claims in Germany, see Hopt & Baetge 1999, p. 54-55, Micklitz & Stadler 2005, p. 12-13, Micklitz & Stadler 2006, p. 1476-1477, Baetge 2009, p. 128, Stadler 2010a, p. 183-184, Meller-Hannich

two mechanisms have been found to be of little use for collective litigation purposes,<sup>199</sup> let alone for entrepreneurial mass litigation. In both situations, the court still considers the bundled actions as individual cases, and thus treats them as such, both procedurally and substantively. Another obstacle for collective redress through these techniques is that the cases at hand need to be or have been brought before the same court. This is often impossible for practical and/or legal reasons. The larger the class, the more difficulties arise. Furthermore, it requires individual actions, which in the case of negative-value claims is unlikely due to rational apathy.

Obviously, certain efficiency advantages can be achieved. For instance, evidence-taking can be combined and costs can be shared. As to the amount in dispute and the related litigation costs (risk), the advantage of bundling depends on the number of claimants and the size of their claim. The charges and fees are calculated based on the combined amounts in dispute, which *pro rata* leads to lower individual costs.<sup>200</sup> For individual cases, the amount in dispute remains capped at € 30 million. However, the combined amount in dispute is capped at € 100 million.<sup>201</sup> The individual liability for adverse costs depends on the case and the underlying mutual agreement. If parties are joined and they are represented by the same legal representative, the court can either state the individual's proportional liability in the costs order, or hold them jointly liable (*Gesamtschuldner*), regardless of their internal individual liability.<sup>202</sup> Nevertheless, the efficiency objective of this procedural device is said to work only if the number of claims is relatively small. If not, ultimately, efficiency advantages in one area will be replaced by disadvantages elsewhere.<sup>203</sup>

An equally unpractical or inefficient mechanism, for different reasons, is the test case (*Musterklage*).<sup>204</sup> In German civil procedure, KapMuG aside, there is no specific regulation (as yet) for such proceedings.<sup>205</sup> Nevertheless, in effect, a test case can provide for collective redress. This requires a consensual agreement between the claimants and the defendant(s) that is in conformity with regular contract law, i) *ex ante*, to litigate the test case and amicably resolve the other cases accordingly (*Musterprozessvereinbarung*), or ii) *ex post*, by way of a settlement after the test case has been decided upon. The former would have to include a suspension of the limitation period or a stay of proceedings for the other claims, and address the binding effect of the test case, as the judgment in such a case does not have this effect. An agreement *ex post* might not be feasible; for instance, due to the expiration of the limitation period for the other claims or the said lack of the binding effect of the test case. Both agreements obviously require the cooperation of the defendant(s), which might be problematic, and require an infrastructure or platform of sorts on the claimants' side for purposes of organization, reg-

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& Höland 2010, p. 123, Rosenberg, Schwab & Gottwald 2010, p. 238, 240-251, Stadler 2014b, and Halfmeier 2015, p. 90. See also Deutscher Bundestag, *Gesetzentwurf KapMuG*, Drucksache 15/5091, 14.03.2005, p. 13-15.

<sup>199</sup> See the references in the previous footnote.

<sup>200</sup> § 22(1) RVG (for attorney fees). See also Halfmeier 2015, p. 90, and section 4.3.2.

<sup>201</sup> § 22(2) RVG.

<sup>202</sup> § 100 ZPO. See also Haag & Geigel 2015, Kap. 41, Rn. 31-39. See also section 4.3.6.

<sup>203</sup> See the literature mentioned in footnote 192.

<sup>204</sup> On test cases by consumer organizations, see also section 4.5.5.1.

<sup>205</sup> On the draft legislative proposal for a *Musterfeststellungsklage*, see section 2.2.2.



istration, administration, information, et cetera. Given these impracticalities and obstacles, this instrument has also been found to be of limited relevance for the pursuit of collective redress.<sup>206</sup> The mildly more successful test case by way of an *Einziehungsklage*, brought by consumer associations, will be discussed in section 4.5.5.1.

### 4.5.3 Representative actions

#### 4.5.3.1 Designated entities

Under German law, in principle, a claimant has to base its action on (an alleged existence of) an own right, and, therefore, enforces a claim in its own name. By way of an exception, a designated entity can bring a representative action in the public interest and, in that sense, has its own right. This entitlement needs to be based on specific legislation. The question of whether the entity has such a right and is thus entitled to bring the action is a matter of substantive law (*Aktivlegitimation*), not of procedural requirements regarding admissibility and standing (*Zulässigkeit* and *Prozessführungsbe-fugnis/Prozessstandschaft*).<sup>207</sup> Consequentially, this question is dealt with according to party presentation of evidence; the court does not have a duty to assess the admissibility/standing of the entity on its own initiative.

The substantive laws that assign this authority are UWG and GWB for competition law, including the protection of consumer interests,<sup>208</sup> and the UKlaG (previously, the AGBG) for consumer law.<sup>209</sup> The remedies that the designated entities can pursue are injunctive relief (*Unterlassungsklage*) and the skimming-off illicit gains (*Gewinnabschöpfungsklage*).<sup>210</sup> The designated private entities that can bring such an action are: business associations (*Verbände zur Förderung gewerblicher Interessen*), chambers of commerce and industry (*Industrie- und Handelskammern* or *Handwerkskammern*), and qualified organizations (*Qualifizierte Einrichtungen*).<sup>211</sup>

Qualified organizations are those consumer associations (in the form of an incorporated association, *eingetragener Verein*) that, upon application, have been qualified by a public authority (Federal Office of Justice, *Bundesamt für Justiz*).<sup>212</sup> In order to be qualified, they need to fulfil the criteria as laid down in § 4(2) UKlaG.<sup>213</sup> In short, the criteria entail an assessment of the professionalism of the applicant, the number of members they represent, and the association's financial means. The organization's goal, as stated in its articles of association, needs to be the protection of general consumer interests by

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<sup>206</sup> Rosenberg, Schwab & Gottwald 2010, p. 239, Stadler 2010, p. 82-83. See also Deutscher Bundestag, *Gesetzentwurf KapMuG*, Drucksache 15/5091, 14.03.2005, p. 13-15.

<sup>207</sup> Micklitz & Stadler 2005, p. 20-21, Rosenberg, Schwab & Gottwald 2010, p. 236-238.

<sup>208</sup> § 8(3)(2-4) and 10(1) UWG, § 33(2) and 34a(1) GWB.

<sup>209</sup> § 3(1) UKlaG.

<sup>210</sup> See sections 4.5.3.2 and 4.5.3.3.

<sup>211</sup> See for an overview of all types of *Verbände*, Meller-Hannich & Höland 2010, p. 36 ff. See also Dürr-Auster 2017.

<sup>212</sup> Or the foreign ones that have been registered with the EU Commission in accordance with the Injunctions Directive (2009/22/EC), section 4.

<sup>213</sup> See <[bundesjustizamt.de/DE/Themen/Buergerdienste/Verbraucherschutz/Verbraucherschutz.html](http://bundesjustizamt.de/DE/Themen/Buergerdienste/Verbraucherschutz/Verbraucherschutz.html)>. The Ministry of Justice has the authority to further regulate the details of the application procedure (§ 4(5) UKlaG), but so far, it has not done so; see Meller-Hannich & Höland 2010, p. 13.

providing information and advice, not for profit, nor ad hoc.<sup>214</sup> It needs to be made clear that the organization is not just acting as a debt collection agency.<sup>215</sup> The association must have been established for at least a year, and act in a professional manner, which is assessed on the basis of its previous activities. It needs to represent at least three active consumer associations or 75 individual members. Its financial means need to be sufficient to bear its own litigation costs and a possible costs award.<sup>216</sup> Publicly funded consumer associations are assumed to meet these requirements, such as the Federation of German Consumer Organisations (*Verbraucherzentrale Bundesverband*) and the regional consumer centres (*Verbraucherzentralen*), and thus need not apply.

Being listed as a qualified organization does not automatically lead to the competence of the consumer association being accepted in a specific case, but nowadays the courts increasingly accept that such an organization is competent, in particular when competence is not in debate.<sup>217</sup> In the case of a doubt as to whether a qualified organization still meets the requirements, such as sufficient financial means to bear a potential costs order, the court can refer the organization back to the *Bundesamt für Justiz* for a repeated assessment.<sup>218</sup> Hence, this test does not take place within the court proceedings and is not public, thus not exposed to the defendant(s).

#### 4.5.3.2 Action for an injunction (*Unterlassungsklage*)

The German action for injunctive relief has long been recognized as an effective instrument to provide collective redress after infringements of consumer and competition law:

*‘Die Rechtsdurchsetzung kollektiver Verbraucherinteressen ist in Deutschland mit dem Siegeszug der Unterlassungsklage verbunden. (...) [Sie gilt] als Exportschlager im Wettbewerb um das beste Rechtsschutzmodell in Europa, vielleicht darüber hinaus. (...) Die Unterlassungsklage ist nach wie vor das Zugpferd des Kollektiven Rechtsschutzes.’<sup>219</sup>*

As discussed in sections 2.2.2 and 4.5.3.1, this representative action to cease and desist wrongful behaviour can be brought by various designated or qualified entities on behalf of those (competitors, consumers, the public) who are affected by infringements of, in particular but not limited to, consumer and competition law. These entities fulfil a public task if traditional instruments of control and law enforcement fail; they aim to restore the functioning of the market.<sup>220</sup> Aggrieved parties can individually profit from the judgment’s reflex effect and precedent (*Breitenwirkung*).<sup>221</sup> For UKlaG cases, the judgment has a binding effect against the same defendant(s) in similar claims.<sup>222</sup>

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<sup>214</sup> See also Micklitz 2013, comments on UKlaG § 4, nos. 17 and 18.

<sup>215</sup> Deutscher Bundestag, *Beschlussempfehlung und Bericht des Rechtsausschusses zu dem Gesetzentwurf zur Modernisierung des Schuldrechts*, Drucksache 14/7052, 9.10.2001, p. 208.

<sup>216</sup> See, for instance, LG Düsseldorf 17.12.2013, 37 O 200/09 (Kart.) U.

<sup>217</sup> Meller-Hannich & Höland 2010, p. 12.

<sup>218</sup> § 4(4) UKlaG.

<sup>219</sup> Micklitz 2012a, p. 96 and 99.

<sup>220</sup> See section 2.2.2.

<sup>221</sup> Tamm 2009, Stadler & Klopfer 2012.

<sup>222</sup> § 11 UKlaG.

The evaluation by Meller-Hannich and Höland in 2010 confirmed the effectiveness of this instrument. A relatively large number of cases are being pursued, particularly with regard to unfair contract terms and unfair commercial practices.<sup>223</sup> A properly functioning network exists to facilitate such redress. However, with regard to infringements of other (non-UWG) consumer law, undertaking such action is more problematic given the high cost risk and the lack of sufficient financial means by consumer associations.<sup>224</sup> The evaluation shows that courts seem to be increasingly inclined to, where possible, take into account the cost risk of consumer associations and their public task. Nevertheless, a number of cost risks remain.

These obstacles signal the contribution that entrepreneurial parties could make. However, for them, the *Unterlassungsklage* is hardly interesting. First and foremost since, if possible at all, it is difficult to capitalize a judgment for injunctive relief. Injunctive relief is about putting a halt to behaviour and preventing future infringements. If not, fines (*Bußgeld*) can be collected, but it is unlikely that the government will allow a private party to collect them. Moreover, the injunctive action is not sufficiently interwoven with individual actions, as the former does not have binding effect on the latter.<sup>225</sup> If this hurdle could somehow be overcome, the currently strictly regulated competence and standing of representative organizations poses an equally important obstacle. An entrepreneurial party will not be able to qualify as an entity to bring such an action as it has a commercial interest. The only way an entrepreneurial party could pursue such an action would be to apply to be recognized as a qualified organization (*Qualifizierte Einrichtung*). This requires the organization to be non-profit, which an entrepreneurial organization obviously is not. Theoretically, it would be possible for an entrepreneurial party to back up or otherwise be involved in an action by a qualified non-profit organization.

In practice, indeed, certain entrepreneurial parties seem to have found a way to engage in this type of collective redress. This is connected to the – extensive – *Abmahnung* practice. Before turning to judicial resolution, an association will almost always first send a formal warning, demanding that the wrongful behaviour must cease and be desisted from (*Abmahnung*). Such a demand will often include the request to declare such termination (*Unterlassungserklärung*), combined with a non-administrative fine (*Vertragsstrafe*), collectable if the activity is continued.<sup>226</sup> The – alleged – wrongdoer owes such a fine to the acting association, as opposed to an administrative fine (*Ordnungsgeld*), which flows back into the public purse. If the wrongdoer does not enter into such an agreement, normally an *Unterlassungsklage* follows; if the agreement has been entered into, but not followed, a claim to collect the fine can follow (*Zahlungsklage*). This extrajudicial armament aims to – and indeed does – stimulate extrajudicial resolution. However, it has given rise to abusive behaviour as well.<sup>227</sup> Some associations have undertaken this practice with the only purpose of collecting the fines. Problematic is the fact that this

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<sup>223</sup> Pursuant to § 1 UKlaG and § 8 UWG, in the latter case both by individuals and consumer organizations. See Meller-Hannich & Höland 2010, p. 12, 15 and 20.

<sup>224</sup> Meller-Hannich & Höland 2010, p. 14, 17.

<sup>225</sup> Micklitz 2012a, p. 100.

<sup>226</sup> See Meller-Hannich & Höland 2010, p. 16, referring to various case law.

<sup>227</sup> See Meller-Hannich & Höland 2010, p. 16, and Deutscher Bundestag, *Beschlussempfehlung und Bericht des Rechtsausschusses zu dem Gesetzentwurf zur Modernisierung des Schuldrechts*, Drucksache 14/7052, 9.10.2001, p. 208.

abuse is only detected when the case is later brought to court, which will not often be the case. In some cases, this has indeed occurred, and the courts have declared the association's behaviour to be abusive.<sup>228</sup> For instance, if an association addresses specific businesses only, this is also considered abusive behaviour. The court then assumes that this is not in the protection of the general consumer interest, but for the association's own gain. Making use of a litigation funder has also been found to be abusive, as it removes the cost and litigation risk for the claimant.

Halfmeier argues, however, that the occurrence of these abusive practices should not be overestimated. He lists the steps that such an association needs to take in order to make more than '*ein karges Brot*'.<sup>229</sup> Basically, it needs to identify a possible infringement, an opponent that instead of object will rashly pay the fine, and then repeat this process, since the fines are generally of a modest amount (€ 200).

#### 4.5.3.3 Action for skimming-off illicit gains (*Gewinn- and Vorteilabschöpfungsklage*)

Since 2004 (UWG) and 2005 (GWB), a designated entity – and sometimes the national cartel authority – can bring a representative action to skim-off illegally obtained profits from businesses that have violated competition rules.<sup>230</sup> The mechanism originated from a competition law enforcement deficit, in particular for negative-value claims (trivial and minor damage, *Bagatell- und Streuschäden*), and aims to deter companies from displaying wrongful behaviour and to ensure that unfair competition does not pay off.<sup>231</sup> The action to skim off ill-gotten gains is intended as a last resort, if claims for individual damages or fines have not yet absorbed the illicit proceeds. It is considered to be an administrative sanction to be applied only in 'hard-core' cases of intentional infringements that concern a large number of persons.<sup>232</sup>

In practice, however, the mechanism is said to lack effectiveness. The instrument has been described as a 'nice colourful paper tiger', '*toter Buchstabe*', '*ein stumpfes Schwert*', '*durchweg dysfunctional*', and of practically almost no importance.<sup>233</sup> First and foremost, because it is not often used. The designated bodies are said to lack incentives to initiate a claim, as the litigation risk is high and thus endangers their budget, whereas they are not allowed to keep the proceeds in the case of a successful action in order to (re)fund their war chest.<sup>234</sup> Instead, the proceeds flow back to the public (federal) purse. The litigation risk is high due to the complexity of this type of claim: proving the infringement, causality between the infringement and the profit obtained, and obtaining the necessary information

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<sup>228</sup> Meller-Hannich & Höland 2010, p. 16, referring to various case law.

<sup>229</sup> Halfmeier 2015, p. 159-160.

<sup>230</sup> § 10 and 8(3)(2-4) UWG and § 33/34/34a GWB. See, for instance, Micklitz & Stadler 2003 and Gärtner 2006. On designated entities, see section 4.5.3.1.

<sup>231</sup> See section 2.2.2.

<sup>232</sup> Deutscher Bundestag, *Entwurf Änderung GWB*, Drucksache 15/3640, 12.08.2004, p. 55.

<sup>233</sup> Micklitz & Stadler 2006, p. 1482-1485, Micklitz 2007, p. 18, Stadler 2010, p. 84, with further references, Micklitz 2012a, p. 100, Geiger 2015, p. 53, Hörmann 2016, p. 82, and Keßler 2016, p. 27.

<sup>234</sup> See, for instance, Micklitz 2006, p. 5-6, Stadler 2010, p. 84, Fezer 2012, p. 6-7, and Geiger 2015, p. 53, with further references.

on the wrongdoer's profits form high thresholds.<sup>235</sup> For instance, requesting the disclosure of such information can be litigated up to the Supreme Court, before the substantive claim is even addressed.<sup>236</sup> The wrongdoer might not even exist by that time, which adds to the claimant's litigation risk.

In 2010, Meller-Hannich & Höland reported that out of the 121 designated entities, four had experience with this action. In total, they had brought 17 actions.<sup>237</sup> A well-known case is the misleading advertisement case of Lidl mattresses. After a successful *Unterlassungsklage*, the claimant (*Verbraucherzentrale Bundesverband, Vzbv*) brought a successful action to skim-off the illicit gains, with a disputed amount of € 25,000. Plausibly, this was not – even close to – the actual profit made, which the claimant had estimated at € 400,000. It had reduced the amount in dispute, however, in order to set the litigation costs at a lower rate.<sup>238</sup> Nevertheless, its bold press release stated:

*‘Unternehmen müssen wissen, dass es teuer werden kann, sich unredlich zu verhalten.’*<sup>239</sup>

Similarly ‘successful’ was the ringtone case. Here, too, the action followed a successful *Unterlassungsklage*, and resulted in a settlement of € 18,500.<sup>240</sup> Although claimants have been successful in some cases it is questionable, to say the least, whether the actions have indeed deterred potential wrongdoers.<sup>241</sup>

In addition to the problematic dual (private and punitive) nature of the remedy,<sup>242</sup> the root cause of the aforementioned lacks of effectiveness are the high litigation costs and risk, and the claimants’ lack of a sufficient ‘war chest’. The litigation costs and risk are far larger in comparison to claims for injunctive relief, in which the statutory charges and fees are relatively low.<sup>243</sup> It could therefore be argued that entrepreneurial parties should be allowed to participate in such actions. This might seem too big a leap of faith, but there is one (unsuccessful) skimming-off claim that has been reported in which a third-party litigation funder was involved.<sup>244</sup> Because the potential proceeds would flow into the public purse, the *Bundesamt der Justiz* had to approve the agreement between the funder and the consumer organization, as it included a percentage of the potential proceeds. The public authority did approve the agreement. As Halfmeier notes, it is striking that consumer organizations are not allowed to obtain

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<sup>235</sup> See, for instance, Gärtner 2008, Deutscher Bundestag, *Zwölfter Zwischenbericht der Enquete-Kommission 'Internet und digitale Gesellschaft'*, Drucksache 17/12540, 14.03.2013, p. 37, Halfmeier 2015, p. 68 ff, and Köhler, Bornkamm & Feddersen 2018, § 10.

<sup>236</sup> Meller-Hannich & Höland 2010, p. 18. On the division between the procedural and substantive phase of German civil litigation, see section 4.4.4.

<sup>237</sup> Meller-Hannich & Höland 2010, p. 50.

<sup>238</sup> See also section 4.3.2.

<sup>239</sup> See <[vzbv.de/pressemeldung/unlautere-werbung-lidl-muss-25000-euro-den-staat-zahlen](http://vzbv.de/pressemeldung/unlautere-werbung-lidl-muss-25000-euro-den-staat-zahlen)>.

<sup>240</sup> Verbraucherzentrale Bundesverband 2011, p. 16.

<sup>241</sup> See, similarly, Hörmann 2016. For an analysis of some cases, see Fezer 2012, p. 25 ff, and Stadler 2016.

<sup>242</sup> See the literature overview in Meller-Hannich & Höland 2010, p. 25 ff, and Fezer 2012, p. 30.

<sup>243</sup> Halfmeier 2015, p. 70.

<sup>244</sup> On this case against a mobile phone provider, see Halfmeier 2015, p. 70, and Hörmann 2016, p. 82.

(a part of) the proceeds, but the state has allowed an entrepreneurial party to do so.<sup>245</sup> To increase the consumer associations' incentives to bring these cases, suggestions have been made to 'privatize' the remedy of disgorgement and to allow (a part of) the proceeds to go to the successful claimant, to a private fund that serves as a war chest, or to a designated fund that is funded by the public purse.<sup>246</sup> Such an incentive has yet to be implemented.<sup>247</sup> Currently, the only specific costs rule that applies is that the designated entity can recover its administrative litigation costs (*Aufwendungen*) from the state (*Bundesstelle*) if it has been successful but unable to recover these costs from the defendant.<sup>248</sup>

#### 4.5.4 Specific group action/a test case: KapMuG

In 2005, the Capital Investors' Model Proceedings Act (*KapitalanlegerMusterverfahrenGesetz*) came into force to protect capital investors' interests if various identical claims for damages originate from a mass damage event in the capital market.<sup>249</sup> The duration of the KapMuG was originally limited to 2012. In that year, the act was slightly amended and the duration date was prolonged to 2020. In essence, it applies to claims for damages originating from prospectus liability and liability for wrong or omitted ad hoc information on the securities market.<sup>250</sup>

The proceedings consists of three parts. In the first phase, at least ten capital investors have to bring an individual claim to the competent court and individually apply for the adjudication of their case pursuant to the KapMuG. This minimum number of claims needs to have been asserted within six months after the court, upon the first application, has opened the register (*Klageregister*).<sup>251</sup> The applications have to state that and how the answer to the central question(s) is of significance for the resolution of the other, similar cases.<sup>252</sup> The court of first instance decides whether the claims are suitable to be resolved collectively through the model proceedings and, if so, what issues should be dealt with in the model proceedings.<sup>253</sup> The court of first instance appoints the appellate court that will address the model case, and stays all other pending proceedings for the course of the model proceedings.<sup>254</sup> With regard to this decision to stay, parties have the right – unless it is waived – to be heard.<sup>255</sup> New cases join the model proceedings automatically – an individual opt-out is not possible at this stage. The second phase commences with the selection of a model case by the appellate court. It takes into account the claimant's suitability to act as model claimant, any agreement between the

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<sup>245</sup> Halfmeier 2015, p. 71.

<sup>246</sup> Micklitz & Stadler 2006, p. 1485, Gärtner 2008, p. 819, Fezer 2012, p. 50, Halfmeier 2015, p. 71 ff, and Keßler 2016, p. 28.

<sup>247</sup> Stadler 2018, p. 85.

<sup>248</sup> § 10(4) UWG and § 34a(4) GWB.

<sup>249</sup> For the underlying policy objectives of the instrument, see section 2.2.2.

<sup>250</sup> § 1(1) KapMuG. On the differences and consequences thereof within the context of KapMuG, see Feess & Halfmeier 2014, p. 364-366. See also Haar 2014, p. 97-99.

<sup>251</sup> § 6(1) and 4 KapMuG.

<sup>252</sup> § 2(3) KapMuG.

<sup>253</sup> § 6 KapMuG.

<sup>254</sup> § 8 KapMuG.

<sup>255</sup> On the problems this has caused for the *Telekom* case, see Halfmeier 2016, p. 287.

claimants and the model claimant, and the value of the claim.<sup>256</sup> Generally, the claimant with the highest amount in dispute is selected, as assumedly he has the most interest in the outcome and thus provides the best guarantee for diligent procedural conduct.<sup>257</sup> The other claimants become petitioners (*Beigeladene*), and have the right to perform procedural acts, as long as these are consistent with those of the model claimant.<sup>258</sup> The appellate court will adjudicate the common legal and factual question(s) of the model case as formulated by the court of first instance. The subsequent model case judgment (*Musterentscheid*) only addresses the model case, but binds all claimants.<sup>259</sup> The court of appeal will then refer the model case back to the court(s) of first instance, which will assess the remaining cases accordingly in the third and last phase of the proceedings. Individual issues such as reliance, causation and/or damages still need to be addressed.<sup>260</sup> Alternatively, the 2012 amendment introduced the possibility for the model claimant and defendant to request the court of appeal to approve an opt-out settlement.<sup>261</sup> The court of appeal assesses the settlement as to its reasonableness.<sup>262</sup> After the approval and notification thereof, parties can opt out within a period of a month.<sup>263</sup> The settlement is only valid if less than 30% of the registered claimants (not: class members) opt out.<sup>264</sup>

Except for the situation in which a settlement is declared binding, the KapMuG is neither an opt-in nor an opt-out mechanism. Instead, it functions on the basis of a ‘no-option’ rule.<sup>265</sup> A claimant either has to bring an individual action, and will then be included in the KapMuG proceedings, or decide to forego his claim. Unlike the Dutch WCAM, an individual does not have the right to bring a ‘separate’ individual action if KapMuG proceedings are deemed suitable.<sup>266</sup> The logic behind this exclusivity was to avoid parallel proceedings. However, as a consequence, the KapMuG is filled with safeguards to adequately protect individual rights – which has led to a burden on the KapMuG proceedings ‘by many tedious petitions and requests’, avoiding which was precisely the objective of the KapMuG to begin with.<sup>267</sup>

On two occasions, a government-commissioned evaluation of the KapMuG has taken place. The instrument was included in the aforementioned evaluation of German collective redress mechanisms by Meller-Hannich & Höland in 2010, and, in 2009, Halfmeier, Rott & Feess exclusively focused on the effectiveness of the KapMuG. The evaluations led to the prolongation of the act, and a revision in order to enhance its efficiency. In addition to the possibility to have a settlement declared binding, the revision

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<sup>256</sup> § 9(2) KapMuG.

<sup>257</sup> Such a selection is comparable to that of the lead plaintiff in American securities class actions; see Stadler 2010, p. 87.

<sup>258</sup> § 9(3) and 14 KapMuG.

<sup>259</sup> § 22 KapMuG.

<sup>260</sup> Haar 2014, p. 100.

<sup>261</sup> § 17-19 KapMuG.

<sup>262</sup> § 18(1) KapMuG.

<sup>263</sup> § 19 KapMuG.

<sup>264</sup> § 17 KapMuG.

<sup>265</sup> Feess & Halfmeier 2014, p. 366. § 7 and 8 KapMuG.

<sup>266</sup> On the WCAM, see sections 2.2.4 and 6.5.6.

<sup>267</sup> Feess & Halfmeier 2014, p. 366. On such problems in the *Telekom* case, see Tilp & Roth 2014 and Halfmeier 2016, p. 287.

sions included the possibility for potential claimants to notify their claim in the register instead of actually having to file an action to participate in the proceedings.<sup>268</sup> This registration does not replace the possible action and by registering, the issuer does not formally join the KapMuG, but it suspends the claim's limitation period. In this way, potential claimants can await the outcome of the test case before deciding to file an action, and thus avoid the cost risk, which had proven to be a disincentive for individual claimants to bring an action in the KapMuG before 2012.<sup>269</sup>

Before 2000, securities litigation was not common; according to Halfmeier, this was mainly caused by the high litigation costs and risk, and the prohibition of contingency fees.<sup>270</sup> The level of litigation altered after a reform of the substantive law on prospectus liability, and the introduction of the KapMuG. Between 2005 and 2014, at least 300 model cases were brought before the Courts of Appeal.<sup>271</sup> In spite of the legislative amendments, the mechanism is still being criticised, in particular for the long duration of its proceedings. The notorious Telekom proceedings is a case in point, although it is important to note that this was the first KapMuG case and the 2012 amendment included improvements 'to speed up the proceedings'.<sup>272</sup> The litigation is said to have been incited by the television appearance of an attorney, Tilp, who nowadays is one of Germany's most prominent 'lead counsel' (those that represent the model claimant) in KapMuG cases.<sup>273</sup> It took many years from the filing of the first claim (in 2001, when the KapMuG had not yet been enacted) to the first oral KapMuG hearing (in 2008). The first decision on liability was issued in 2012, upon which the Supreme Court's judgment followed in 2014, which reversed the Court of Appeal's decision, in favour of the claimants, which, in turn, was followed by two Court of Appeal decisions, one in favour of the claimants, for which an appeal at the Supreme Court is currently pending, and one in favour of the defendants, which was upheld by the Supreme Court in 2017.<sup>274</sup> Depending on the outcome of the currently pending appeal, the approximately 17,000 individual claims for damages might still need to be addressed by the court of first instance, unless a collective settlement follows. The American tandem proceedings of the Telekom case, a class action, was settled in 2005 (including a contingency fee for the plaintiffs' lawyers, 28% of the settlement fund).<sup>275</sup> On the main defence attorney in the German case, however, Halfmeier states:

*'His very strict strategy in the Telekom case – to deny any settlement and fight every single allegation by the plaintiffs – proved successful at least up until the model decision of 2012 that was in favour of Telekom. Now it might need to be revised after the pro-plaintiffs judgment by the Federal Court.'*<sup>276</sup>

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<sup>268</sup> § 10(2-4) KapMuG.

<sup>269</sup> Halfmeier 2016, p. 294, Haar 2014, p. 102, Halfmeier, Rott & Feess 2009, p. 101-103.

<sup>270</sup> Halfmeier 2016, p. 282.

<sup>271</sup> Stadler 2016, whose numbers are based on the official statistics of the German Federal Office of Statistics (which does not identify the applications made for KapMuG proceedings at the courts of first instance).

<sup>272</sup> Halfmeier 2016, p. 293.

<sup>273</sup> Halfmeier 2016, p. 282-283 and 294.

<sup>274</sup> See Halfmeier 2016, Stadler 2016, Tilp & Roth 2014, and the claimant's lead counsel's website <tilp.de/deutsche-telekom>.

<sup>275</sup> Tilp & Roth 2014, p. 134, Halfmeier 2016, p. 285.

<sup>276</sup> Halfmeier 2016



In addition to lengthy proceedings, another obstacle of the KapMuG was that the monetary incentives for attorneys to bring a model case were said to be low, whereas the workload is high.<sup>277</sup> Lawyers' 'economics' remain challenging, as legal aid insurance is unavailable and contingency fee constructions are not allowed. Halfmeier notes that:

*'most plaintiff lawyers resort to cooperation with third party litigation companies, or to other models that tend to circumvent the prohibition on contingency fees.'*<sup>278</sup>

Nevertheless, the Telekom case has accelerated the emergence of a sophisticated and competitive plaintiff bar in capital market cases, representing both private and institutional investors.<sup>279</sup> For instance, in the Telekom case, some 900 law firms are involved in representing the claimants, although Tilp & Rotter state that only a small number of those firms have made a noteworthy contribution.<sup>280</sup> Halfmeier, however, emphasizes the growing professionalism:

*'While in the 1990s there may have been a certain asymmetry in German lawyers' culture between more sophisticated (and well-paid) commercial lawyers and – allegedly – less competent and less successful lawyers on the plaintiff side, now this has changed to some extent as plaintiff law firms are also seen as competent and may even be regarded by some well-qualified law graduates as desirable places to work.'*

On the exact level of involvement of (other) entrepreneurial parties in KapMuG, there is not much information available. They are involved in high profile cases, such as the Volkswagen claim. As mentioned in section 3.3, some third-party litigation funders are backing the claims of three law firms that have filed claims on behalf of various (institutional) investors. Moreover, American law firms are involved, which are likely to have an entrepreneurial stake in the litigation as well.<sup>281</sup>

#### **4.5.5 Assignment model**

##### **4.5.5.1 By a consumer association (*Musterklage* and *Sammelklage*)**

As introduced in section 4.4.4, since 2002 consumer associations are allowed to enforce consumer claims for damages in their own name after infringements of consumer law. This right follows from the assignment by one or more consumers of their claim to the association (*Einziehungsklage*).<sup>282</sup> The enforcement can be done by way of consolidating a number of claims (*Sammelklage*) or, as discussed in section 4.5.2, as a test case (*Musterklage*) that represents a number of similar cases with the same issues of law or fact. The mechanism has been allowed in particular for the pursuit of negative-value claims. The consumer association bears the costs (risk) and, therewith, aims to mitigate individuals' rational apathy.

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<sup>277</sup> Wagner 2010, p. 183. See, similarly, Rotter 2011, p. 449.

<sup>278</sup> Halfmeier 2016, p. 295.

<sup>279</sup> Halfmeier 2016, p. 288 and 294-296.

<sup>280</sup> Tilp & Roth 2014, p. 132-133.

<sup>281</sup> See also the overview on <[newsroom.legial.de/fileadmin/newsroom/RM\\_03\\_2016\\_Klageflut.pdf](https://newsroom.legial.de/fileadmin/newsroom/RM_03_2016_Klageflut.pdf)>.

<sup>282</sup> § 8(1)(4) RDG and § 79(2)(3) ZPO.

The *Sammelklage* has been used to obtain collective redress, mainly after a successful claim for injunctive relief (*Unterlassungsklage*).<sup>283</sup> However, the use of this instrument is limited.<sup>284</sup> It is deemed ineffective in the situation where large groups of consumers have been harmed. In practice, the individuals' rational apathy is not cured by this instrument, and the administrative costs for consumer organizations are substantial, whereas they bear the litigation costs (risk). The claim(s) for damages is/are only manageable if the total number of aggrieved persons is not too high and they can be easily identified, as each claim needs to be assigned individually and assessed on its own merits.<sup>285</sup> It also lacks effectiveness because it is an opt-in mechanism, and only those that assign their claims are compensated in the case of success. Unsurprisingly, since the claims concern negative-value damage, the numbers of opt-ins in comparison to the number of class members are usually low.<sup>286</sup> Furthermore, as the instrument is intended for scattered damage, courts have interpreted the consumer organization's standing in a strict manner.<sup>287</sup> Hence, in practice, the instrument is of little relevance to obtain collective redress.

Due to the aforementioned obstacles, the assignment model is mostly employed as a test case to answer a legal question that is relevant for numerous other consumers.<sup>288</sup> The practical and legal problems with such a test case as a collective redress mechanism, as discussed in section 4.5.2, apply here as well: a test case judgment does not have a binding effect on other cases, and the 'parked' claims risk limitation problems.<sup>289</sup> A test case can have an impact on the development of the law.<sup>290</sup>

#### 4.5.5.2 By a special purpose vehicle (*Rechtsverfolgungsgesellschaft*)

A potentially suitable mechanism for entrepreneurial mass litigation is the entrepreneurial party's establishment of a special purpose vehicle (SPV, *Rechtsverfolgungsgesellschaft*) to which class members assign their claim. The economic risk of enforcing the claim partly remains with the original claim owner. Hence, the activity of an SPV is considered a debt collection service (*Inkassodienstleistung*).<sup>291</sup> As discussed in section 4.2, the professional debt collection of assigned claims is considered to be a legal service, and a party may only provide such a legal service within the limits of the Legal Services Act.<sup>292</sup> Hence, the SPV needs to be registered in order to be able to enforce the claims.<sup>293</sup> Furthermore, as the following case in point will show, entrepreneurial parties' quest for acceptance of their for-profit pursuit of collective redress has not been without costly legal hiccups.

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<sup>283</sup> Meller-Hannich & Höland 2010, p. 18, 123.

<sup>284</sup> Meller-Hannich & Höland 2010, p. 50.

<sup>285</sup> Stadler 2010, p. 83, Hörmann 2016.

<sup>286</sup> Geiger 2015, p. 55. For some striking examples, see Hörmann 2016 and Halfmeier 2015, p. 35-36.

<sup>287</sup> Micklitz 2006, p. 6.

<sup>288</sup> Verbraucherzentrale Bundesverband 2011; Wendt 2011, Stadler 2016, under IV.

<sup>289</sup> Stadler 2010, p. 82.

<sup>290</sup> Hörmann 2016 and Halfmeier 2015, p. 35-36, and the example provided in Stadler 2016.

<sup>291</sup> § 2(2) RDG. See also Thole 2015, p. 97, with further references.

<sup>292</sup> Registered pursuant to § 10(1)(1) RDG.

<sup>293</sup> On the conditions, see section 4.4.4.

This particular type of entrepreneurial mass litigation was first tested in CDC's cement cartel claims.<sup>294</sup> CDC is a Belgian-based company that purchases and bundles individual claims for damages that have arisen out of cartel infringements.<sup>295</sup> After having done so, CDC pursues them in its own name. The contracts between CDC and individual class members stipulate that in the case of success, CDC will receive a percentage of the proceeds. CDC takes over the litigation risk and if the case is lost, it covers its own and the adverse litigation costs. In the cement cartel case the question arose whether CDC's business model was consistent with German law. In 2009, the Supreme Court upheld the lower courts' judgments that CDC was entitled to bring the bundled claims it had purchased from a number of cement cartel victims, as claims of its own.<sup>296</sup> At that point, the courts had not yet decided on the merits of the case, including the – contested – validity of the assignments.<sup>297</sup> Whereas some academics were still somewhat hesitant as to whether the court would irrevocably 'bless' CDC's business model,<sup>298</sup> others saw the judgment as a growing willingness to permit innovative forms of litigation funding.<sup>299</sup> However, after a referral back to the court of first instance, in 2013, the Düsseldorf District Court rejected CDC's method of amalgamating cartel claims. The court's main arguments can be summarised as follows.

The assignments concluded before July 2008 fell within the reach of the Legal Counsel Act (applicable to legal advisors other than those admitted to the German bar).<sup>300</sup> CDC was not authorized under this act to commercially collect 'foreign' claims. Therefore, these assignments were void. As to the assignments that fell under the superseding – and less strict – Legal Services Act, CDC was registered accordingly and was allowed to enforce 'foreign' claims. However, the district court found the assignments at hand to be contrary to public policy, as they infringed the – constitutional – principle of an even distribution of the cost risk. According to the court, 'third' parties need to have sufficient financial means to bear their own and potential adverse litigation costs up until the Supreme Court, without having to reduce the amount in dispute. In light of this principle, assignments should not be (ab)used in a manner that deprives a defendant from forfeiting a costs award; it should be avoided that a party without sufficient funds is pushed forward as a litigant. Although the court deemed CDC's business model to offer considerable benefits for both CDC and the aggrieved parties, it neglected the principle of an even distribution of the procedural risk in an unacceptable manner. As CDC was not financially equipped to fully bear this litigation risk at the time of concluding the assignments, the defendants ran the risk of not being able to recover potential adverse costs. According to the court, this shifts the cost risk from CDC or the cement purchasers to the defendants, without justification.<sup>301</sup> The court did not

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<sup>294</sup> On this case, see Stadler 2014, Tillema 2014 (comparing it to Dutch case law; see also section 6.5.3), and Stadler 2017.

<sup>295</sup> <carteldamageclaims.com/>.

<sup>296</sup> By dismissing the appeal against the denial of the request for leave to appeal.

<sup>297</sup> Arguments that attack the validity of an assignment have to be assessed at a later stage, since they concern a party's right (*Aktivlegitimation*), not admissibility. See section 4.4.4.

<sup>298</sup> Weidenbach 2007, p. 849.

<sup>299</sup> Hess & Hübner 2010, p. 360.

<sup>300</sup> See section 4.2.

<sup>301</sup> LG Düsseldorf 17.12.2013, 37 O 200/09 (Kart.) U, Rn. 101.

consider the efficiency and costs advantages of bundling the claims (for both parties), such as the advantage of the regressive costs structure and a cap on the amount in dispute.<sup>302</sup>

How did the court know about CDC's financial status? This was shown by CDC's own statement when it had commenced the action and requested to tie the court charges and attorney fees to a reduced amount in dispute.<sup>303</sup> CDC had issued a declaration by its board that it would not be able to fully bear the litigation costs risk. In 2005, the district court nevertheless found CDC financially sound enough to do so, and rejected the request. Eight years later, the same court used the same declaration to underpin its argument that CDC, at the time of concluding the second cluster of assignments, did not have sufficient means to cover a costs award in the case of loss. CDC's statements during litigation that, meanwhile, it had taken precautionary measures to cover a potential adverse costs award, was not enough:

*'Abgesehen davon, dass sich fraglich erscheint, ob die Fähigkeit zur Erstattung der Kosten erster Instanz ausreicht, ist dieser Vortrag aber auch ersichtlich derart unbestimmt, dass er nicht zu berücksichtigen ist. Denn es bleibt unklar, worin die behauptete „hinreichende Sicherstellung“ besteht, ob sie bereits zum Abtretungszeitpunkt bestand oder ob ihr Eintritt damals zumindest sicher voraussehbar war.'*<sup>304</sup>

The Higher Regional Court confirmed the judgment.<sup>305</sup> In essence, that means that CDC's request to reduce the amount in dispute had caused collateral damage with a huge impact: CDC's claim vanished into thin air. Possibly not fully, though, as in 2015 CDC issued a second, related claim concerning a regional cement cartel. It provided security for costs of € 2.3 million.<sup>306</sup> The district court rejected the claim as being time barred, but the appeal is currently pending.<sup>307</sup> To conclude, an entrepreneurial party might be allowed to purchase, bundle and pursue the claims as its own, but when doing so, the SPV has to bolster its coffers (at the right time) in order to be able to bear a potential adverse costs award. In this respect, there is another relevant aspect of this case. The six defendants had issued third-party notices to other companies, which intervened, thereby increasing the adverse costs that CDC had to pay to a total of more than € 3.5 million.<sup>308</sup>

The judgment did not refrain SPVs from entering and operating in the mass litigation market.<sup>309</sup> Another cartel case, part of the Air Cargo claims that are pending before various European courts, was brought by an SPV that was established by one of the harmed parties. The case was settled in early

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<sup>302</sup> See section 4.3.2. See also Tillema 2014, and Thole 2015, p. 99.

<sup>303</sup> See section 4.3.2.

<sup>304</sup> LG Düsseldorf 17.12.2013, 37 O 200/09 (Kart.) U, Rn. 118.

<sup>305</sup> CDC's leave to appeal was denied.

<sup>306</sup> Stadler 2017, p. 205.

<sup>307</sup> See <[carteldamageclaims.com/competition-law-damage-claims/cement-cartels/](http://carteldamageclaims.com/competition-law-damage-claims/cement-cartels/)>.

<sup>308</sup> See <[carteldamageclaims.com/competition-law-damage-claims/cement-cartels/](http://carteldamageclaims.com/competition-law-damage-claims/cement-cartels/)>.

<sup>309</sup> See, for instance, <[metaclaims.de](http://metaclaims.de)>, <[myright.de](http://myright.de)>, <[bankright.de](http://bankright.de)>, <[flightright.de](http://flightright.de)>, <[financialrightclaims.com](http://financialrightclaims.com)>, and DB Competition Claims.

2018.<sup>310</sup> SPVs are also involved in other types of damages claims. As mentioned in section 4.4.3, some SPVs bundle assigned (low-value) consumer claims, such as Metaclaims.<sup>311</sup> In the case of success, the participating consumers recover 65-80% of the individual proceeds. Another example is MyRight.com, which states that it is pursuing the claims of about 35,000 Volkswagen car owners.<sup>312</sup> In the case of success, the individuals will receive 65% of their individual proceeds, unless their legal aid insurer covers the litigation costs. MyRight, in turn, is supported by a US law firm and backed by the litigation funder Burford.<sup>313</sup>

#### **4.6 Summary: rules and features that shape German entrepreneurial mass litigation**

In the following, I will summarize the main findings on the elements that affect the operation of entrepreneurial mass litigation in Germany.

German civil justice is generally regarded as being influential and efficient. Dispute resolution is a joint responsibility of parties and the court, and various guiding principles aim to balance party autonomy with courts' case management powers. Furthermore, various measures, such as costs incentives, aim to facilitate consensual dispute resolution at the earliest occasion. A quick scan also shows that the said efficiency is not so apparent when it comes to complex litigation. The legislator and the courts emphasize the protection of individual rights, also within the context of collective redress. Collective redress is regarded as a last resort.

The legal services market is strictly regulated, both in and out of court. Attorneys have largely maintained their monopoly over providing legal advice and enforcement. As independent bodies of the administration of justice, guided by professional and ethical rules, they are seen as being best equipped to protect society's interests. Inasmuch as other legal services providers are allowed to engage in a 'foreign' claim, they need to be authorized as such by a public authority and act within the limits of the Legal Services Act. For instance, consumer organizations can enforce consumer claims under strict criteria on professionalism and financial means. Entrepreneurial parties are active in the litigation market, in particular third-party litigation funders, but they cannot provide legal services unless registered as such. So far, no other measures have been implemented to regulate and supervise litigation funding.

The German costs system aims to promote the predictability of costs by way of a statutory fixation of court charges and attorney fees, and the pursuit of small claims by way of cross-subsidization. Parties – as well as funders – can precisely calculate the litigation costs and risk (the potential adverse costs award). The charges and fees are based on the amount in dispute, which (for this purpose) is capped at € 30 million. Some exceptions apply for certain claims. For instance, in competition law cases, the court can reduce the amount in dispute if the claimant's economic situation so demands. For court proceedings, attorneys and clients are allowed to negotiate a higher fee than the statutorily fixed one.

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<sup>310</sup> D. Fockenbrock, *Zahltag für das Luftfracht-Kartell*, *Handelsblatt* 6 February 2018.

<sup>311</sup> See <metaclaims.de>.

<sup>312</sup> See section 3.3.3, and <myright.de/>.

<sup>313</sup> See Zivanic 2016, and F. Wilke & B. Müller, 'Per Mausclick zum Recht', *Süddeutsche Zeitung* 8 May 2017.

This is common in complex litigation, but such a fee is not necessarily recoverable in the case of success. There are no relevant rules for providing security for costs, but there is an entrepreneurial party that has started doing so in light of critical case law on its business model.

Costs (shifting) rules and proceedings are relatively simple and efficient. Normally, all (necessary) statutory costs are shifted to the successful party. Courts do not have many discretionary powers as to costs shifting. The actual assessment takes place in separate costs proceedings before the same court. Due to the strictly regulated costs (shifting) rules, parties' litigation conduct plays a limited role and does not create extensive litigation. Separate proceedings for additional claims for damages, such as extrajudicial or litigation funding costs, are rare. For such liability, the costs need to be necessarily and appropriately incurred and of a reasonable amount, criteria which are not easily met. A non-party to litigation can be held liable for adverse costs in limited circumstances only. Enabling litigation by 'merely' providing funding is not sufficient to be held liable.

Legal expenses insurance is the main source of alternative funding, but is not available for commercial or securities litigation. Contingency fees are not often entered into, since they are only allowed if the party's financial situation is impaired in such way that pursuing a claim would otherwise be impossible. The main entrepreneurial parties in Germany are third-party litigation funders, having emerged from the blooming legal expenses market. However, they take up a minor part of the litigation funding market. Between third-party funders, too, there is little competition. This type of funding is mainly used in commercial disputes; for other types of (small) claims the options are restricted, but are increasing. Although third-party funding remains precarious in light of various legal obstacles, it is recognized as a justified means to obtain access to justice. Their experience in assessing claim validity is considered an advantage as it supplements the attorneys' expertise. Third-party funding contracts are often undisclosed, they ensure confidentiality, limit the funder's external liability, and ensure a mutual deliberation on litigation strategy and decisions. Nevertheless, strictly speaking, a funder's active involvement in litigation is not permitted, unless it is authorised to provide legal advice. A third-party funding contract differs from funding provided by a special purpose vehicle, as the latter pursues (bundled) assigned claims in its own name. In order to be authorized, it needs to be adequate, trustworthy and professional, have a professional indemnity insurance and a trust account. Here, too, there are legal obstacles, and the inherent uncertainty has so far limited this type of litigation funding.

For collective redress, Germany strongly focuses on semi-public bodies, such as consumer organizations. So far, the aforementioned entrepreneurial parties have not been much involved in *mass* litigation. The restrictions on the legal services market and hesitance or aversion towards collective redress have so far turned entrepreneurial mass litigation in Germany into a legal minefield and, consequently, there is not (yet) a well-developed market. Nevertheless, some (international) entrepreneurial activities in the collective redress market are emerging, in particular in KapMuG cases.

As mentioned, the hesitance towards collective redress is rather strong in Germany. Nevertheless, there are a number of routes along which collective redress can be obtained, with varying effectiveness. For practical and legal reasons, the 'traditional' routes of joinder and a test case have both been found to be of relatively little use for collective litigation purposes, let alone for entrepreneurial mass litigation. The same can be said for the action to skim-off illegally obtained profits. In particular, since the litigation risk is high, and designated entities lack incentives to bring such claims. In one case, the

state allowed an entrepreneurial party to cover the litigation risk, but otherwise they are not involved in this type of litigation. The long-standing action for injunctive relief is considered to be an important and effective instrument, although it cannot provide for compensatory relief. Such actions are brought by designated (non-entrepreneurial) parties. There have been some instances of entrepreneurial activities, however, in collecting extrajudicial, non-administrative fines from businesses. If detected, courts have found such behaviour to be abusive. The courts assumed that in such situations, the activities did not aim to protect general consumer interests. The actual occurrence of abusive practices, however, has been contested in the literature.

So far, the KapMuG is the main instrument that can provide for compensatory collective redress. Aggrieved capital market investors can obtain compensation either by way of individual litigation that follows the model case judgment, or by way of a court-approved collective settlement. This settlement binds the parties to litigation (not: all class members), except for those that opt out. In order to avoid parallel proceedings, individuals cannot bring a separate individual action. Consequentially, the KapMuG design includes many safeguards to adequately protect individual rights, which has led to lengthy litigation. Entrepreneurial lawyers, including American law firms, and funders are seen to be increasingly cooperating, which has been said to have created a ‘plaintiff bar’ in these types of cases. In addition, the assignment model, where class members assign their claim to a third party, can provide for compensatory collective redress. The model can be employed by consumer organizations and entrepreneurial special purpose vehicles. In the latter situation, however, the resistance towards collective redress and entrepreneurial parties being involved has created some legal uncertainties as to the acceptance thereof. Nevertheless, this type of entrepreneurial mass litigation is emerging in competition law and consumer law cases.

To conclude, Table VI lists Germany’s rules and features that potentially mediate the beneficial or disadvantageous operation of entrepreneurial mass litigation, per addressed key issue.

Key issue	Distilled rule or feature
Essentials of the civil justice landscape	<ul style="list-style-type: none"> <li>- Increasing focus on efficiency and the joint responsibility of parties and courts</li> <li>- Increasing case management by courts</li> <li>- Focus on the protection of individual rights</li> </ul>
The legal services market	<ul style="list-style-type: none"> <li>- Strictly regulated legal services market</li> <li>- Attorneys monopoly in litigation, seen as the main promoters of the independent administration of justice</li> <li>- Attorneys are guided by professional and ethical rules</li> <li>- Strict regulation and authorization of alternative legal services providers, including criteria on professionalism, financial means, professional indemnity insurance and trust account.</li> <li>- No additional regulation and supervision of third-party litigation funding</li> </ul>

Litigation costs and cost-shifting	<ul style="list-style-type: none"> <li>- Predictable litigation costs (own costs and <i>inter partes</i> costs)</li> <li>- Pursuit of small claims is stimulated by way of cross-subsidization</li> <li>- Regressive charges and fees structure</li> <li>- Court control over litigation costs (in determining the amount in dispute which decides the statutory fees and charges)</li> <li>- In general, full indemnification of the successful party's litigation costs</li> <li>- Court can reduce an agreed fee if it is inappropriately excessive</li> <li>- Recovery of extrajudicial costs or litigation funding costs as damages only in limited circumstances</li> <li>- Few cost sanctions for abusive litigation, and liability for such damages is rarely invoked/awarded</li> <li>- Limited options to hold a non-party liable for adverse costs; requires separate proceedings</li> <li>- Security for costs not legally required but occasionally provided in practice</li> </ul>
Private litigation funding	<ul style="list-style-type: none"> <li>- Legal expenses insurance is the main source of alternative funding</li> <li>- Contingency fees allowed in limited circumstances only, and rarely entered into</li> <li>- Third-party funders act as a key player in addition to the attorney, and are appreciated as such; limited involvement in litigation decisions due to the strict regulation on providing legal services</li> <li>- Third-party funders mainly operate in commercial disputes, but are testing the market in consumer law cases</li> <li>- No regulation on result-based remuneration percentages; guided by market and general civil law</li> <li>- Little competition between third-party litigation funders</li> <li>- Entrepreneurial special purpose vehicles, if authorized, can purchase (and bundle) claims, but litigation remains a legal minefield</li> <li>- Strict rules on procedural requirements such as standing, in a phase separated from the assessment of a claim's merits</li> </ul>
Specificities and safeguards of the collective redress mechanisms	<ul style="list-style-type: none"> <li>- Strict judicial assessment of procedural rules such as standing</li> <li>- Strong focus on semi-public representative bodies; limited, yet growing, involvement of third-party funders and special purpose vehicles</li> <li>- Strict case law on their financial means in relation to litigation costs risk</li> <li>- No regulation on the disclosure of the presence or identity of a third-party litigation funder</li> <li>- Development of a 'claimants' bar in KapMuG cases, including American law firms</li> <li>- Competition in being appointed 'lead counsel' in KapMuG cases; competing cases restricted by law</li> </ul>

Table VI: German rules and features that potentially mediate the benefits or drawbacks of entrepreneurial mass litigation





## 5 England and Wales

*'There is no doubt that civil litigation, particularly in England and Wales, is expensive.'*<sup>1</sup>

*'The Government (...) clearly envisaged that many collective actions would be dependent on third party funding.'*<sup>2</sup>

### 5.1 Setting the scene: some essential features of the civil justice landscape

As a common law jurisdiction, in which 'a body of instincts and principles' 'is developed organically, building on what was there before', England and Wales have an inherent flexibility and capacity to develop the law as applied by judges, independently of legislation.<sup>3</sup> This flexibility is embedded in doctrines such as precedent.<sup>4</sup> Nevertheless, various statutory instruments exist nowadays, also concerning civil procedure – notably the 1998 CPR.<sup>5</sup>

Contrary to continental jurisdictions, English law has a less strict division between private and public proceedings. Generally, civil law means 'not criminal'.<sup>6</sup> The court system for civil matters in England and Wales can be summarized as follows. The court of first instance is the Magistrates' Court (family law), the County Court (cases under a certain amount in dispute and level of complexity), where the majority of civil cases are brought,<sup>7</sup> or (otherwise) the High Court. The High Court is split into three divisions: the Queen's Bench Division (e.g. contract and tort), the Chancery Division (e.g. corporate law, insolvency law, the law of inheritance and trusts), and the Family Division. As of July 2017, the specialist civil courts of the Commercial Court, the Technology and Construction Court (both sub-divisions of the Queen's Bench Division), and those of the Chancery Division have been renamed; they now fall under the umbrella of the newly introduced Business and Property Courts of England and Wales.<sup>8</sup> It is possible to try a civil case by jury; however, this is exercised only in rare types of cases,<sup>9</sup>

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<sup>1</sup> Sime & French 2015, p. 87.

<sup>2</sup> *Merricks v. Mastercard and Others* [2017] CAT 16, para. 127.

<sup>3</sup> *Patel v. Mirza* [2016] 3 W.L.R. 399 (SC), p. 459-460.

<sup>4</sup> *Stare decisis* or the doctrine of binding precedent states that judgments of courts that are superior in hierarchy generally have binding force. Persuasive decisions are those of courts of the same level. See, for instance, Sime 2006, p. 24, and Slapper & Kelly 2015, section 4.2 and Chapter 6.

<sup>5</sup> SI 1998/3132. The CPR are rules of court that are made by the Civil Procedure Rule Committee. This is an advisory non-departmental public body set up under the Civil Procedure Act 1997. See also <[gov.uk/government/organisations/civil-procedure-rules-committee](http://gov.uk/government/organisations/civil-procedure-rules-committee)>. The rules are submitted to the Lord Chancellor and – if allowed – are contained in a statutory instrument.

<sup>6</sup> Uff 2013, p. 196. See also Sime & French 2015, p. 60-69 and p. 217-223.

<sup>7</sup> See, for instance, Jackson 2009, p. 53.

<sup>8</sup> See Judiciary of England and Wales, *The Business and Property Courts of England & Wales. An Explanatory Statement*, May 2017, available at <[judiciary.gov.uk/wp-content/uploads/2017/03/bpc-explanatory-statement-final-20170518-v2.pdf](http://judiciary.gov.uk/wp-content/uploads/2017/03/bpc-explanatory-statement-final-20170518-v2.pdf)>. Recently, Lord Justice Briggs has made recommendations for further decision-making on the future of the civil court divisions, for instance, abolishing the separate divisions; Briggs 2016, Chapter 8.

<sup>9</sup> Next to criminal cases at the Crown Court, it mainly concerned cases of libel and slander, see Hodges 2009a, p. 110. However, trial by jury in such cases was abolished in 2014. See Sime & French 2015, p. 1005.

and is irrelevant within the context of this book. At the appellate level, appeals on points of law and facts are adjudicated by the Civil Division of the Court of Appeal in London. Finally, the Supreme Court is the court of appeal for all UK civil cases on points of law.<sup>10</sup> Permission to appeal is required, which can be obtained either from the Court of Appeal or from the Supreme Court. Certain cases are adjudicated by Tribunals. Tribunals are specialised courts in certain areas of law, part of the independent judiciary, with panels of judges that include non-legal experts.<sup>11</sup> For instance, the Competition Appeal Tribunal (CAT) was established in 2002 to hear and decide claims and applications under, inter alia, the Competition Act 1998.<sup>12</sup> The civil courts' structure was recently reviewed by Lord Justice Briggs, which has led to recommendations that also affect the costs of litigation; inter alia, the introduction of an online court and rebalancing London and regional civil justice.<sup>13</sup>

Although civil procedure remains adversarial in the sense that parties control the issues in dispute and the gathering of evidence, the judiciary's inquisitorial approach and active case management have significantly increased in the past couple of decades.<sup>14</sup> The review of access to justice by Lord Woolf in 1995 can be placed at the heart of this development, and its objectives were further advanced by Lord Justice Jackson's review of civil litigation costs.<sup>15</sup> The Woolf reports led to various recommendations to render civil procedure simpler, more efficient and less expensive, and to the introduction of the CPR in 1998.<sup>16</sup> In conformity with Lord Woolf's recommendation, case management was made a cornerstone of the procedural reforms, also for multi-party actions.<sup>17</sup> To meet the needs of the 21<sup>st</sup> century, the recommendations introduced a paradigm shift for civil justice, with court-controlled case management complementing party autonomy and the traditional aim of securing substantive justice.<sup>18</sup> First and foremost, this is expressed in the overriding objective that instructs courts to deal with cases justly and at proportionate cost, to which objective courts must give effect whenever they exercise any power or interpret any rule.<sup>19</sup> General case management powers include identifying relevant issues and necessary evidence at an early stage of the proceedings, or requiring parties to do so, fixing timetables, and prompting parties to prepare litigation costs budgets and to submit them for approval at the start of the pre-trial process.<sup>20</sup> Various sanctions, which need to 'fit the crime', can follow non-

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<sup>10</sup> The Supreme Court was formerly known as the House of Lords.

<sup>11</sup> Uff 2013, p. 197.

<sup>12</sup> Enterprise Act 2002, section 12. See for a full overview of the types of proceedings before the Tribunal <[catribunal.org.uk/242/About-the-Tribunal.html](http://catribunal.org.uk/242/About-the-Tribunal.html)>.

<sup>13</sup> See Briggs 2016. See also Ministry of Justice, *Transforming our justice system: summary of reforms and consultation*, September 2016, p. 8.

<sup>14</sup> See Andrews 2013, p. 334 ff, Sorabji 2015, p. 165 ff, Sime & French 2015, p. 695 ff.

<sup>15</sup> The Jackson reports will be discussed in section 5.3.

<sup>16</sup> SI 1998/3123. Ever since, the CPR have been amended on several occasions; see for an overview <[justice.gov.uk/courts/procedure-rules/civil/stat\\_instr](http://justice.gov.uk/courts/procedure-rules/civil/stat_instr)>. The CPR are accompanied by numerous Practice Directions (PDs).

<sup>17</sup> Lord Woolf 1995, p. 18, Lord Woolf 1996, p. 226. A clear example of case management techniques within the context of group litigation is the Buncfield case, as discussed by Tzankova 2014 and Creutzfeldt & Hodges 2016. See also section 5.5.

<sup>18</sup> Sorabji 2014, § 1.4.1.

<sup>19</sup> CPR 1.1 and 1.2.

<sup>20</sup> CPR 1.4(2). See Sime & French 2015, p. 57-58 and 777 ff and Zuckerman 2013, p. 31 ff and p. 527 ff. CPR Part 3 addresses the court's case and costs management powers. See also section 5.4.

compliance; for instance, a cost sanction or striking out part of a statement. A court can also restrain disproportionate and unnecessary litigation, or even prevent a litigant from continuing or commencing a claim without the court's permission.<sup>21</sup> Parties' responsibilities and the court's supervision depend on the case track to which the court has allocated the claim: small claims track, fast track, or multi-track.<sup>22</sup> The trial phase in complex litigation is usually lengthy, it can take several months. For instance, the trial in the RBS litigation (GLO) was estimated to take 12 weeks.<sup>23</sup>

Despite the efficiency reforms, litigation in England and Wales remains costly. This explains the relatively low placement of the UK as compared to the Netherlands and Germany (ranking 1<sup>st</sup> and 2<sup>nd</sup>) in the category 'civil justice' in the Rule of Law Index 2016, where the UK occupies sixteenth place.<sup>24</sup> The lower placement can be mainly attributed to the UK's score on 'Accessibility and Affordability'.<sup>25</sup> Otherwise, as to the efficiency of its legal framework for dispute resolution, the United Kingdom continues to feature in the top ten in the Global Competitiveness Index.<sup>26</sup>

The civil justice reforms' objectives and high litigation costs have also incited the support for ADR. ADR can include conciliation, and commercial contracts often encompass an obligation for parties to negotiate prior to initiating proceedings.<sup>27</sup> In 2004, the Court of Appeal stressed that:

*'[a]ll members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR. But we reiterate that the court's role is to encourage, not to compel. The form of encouragement may be robust.'*<sup>28</sup>

Consensual settlement at the earliest appropriate occasion is stimulated in pre-action protocols, and through pecuniary incentives and case management. For instance, cost consequences can follow an

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<sup>21</sup> Through general case management powers pursuant to CPR 3.1, or (for vexatious litigants) an order under the Senior Courts Act 1981, section 42, or a civil restraint order as defined in CPR 2.3(1); see Sime & French 2015, p. 275 ff.

<sup>22</sup> CPR 27-29.

<sup>23</sup> RBS Rights Issue Litigation [2017] EWHC 463 (Ch), para. 3.

<sup>24</sup> Separate numbers and figures for England and Wales are not reported.

<sup>25</sup> Provided by the World Justice Project. See <[worldjusticeproject.org/sites/default/files/media/wjp\\_rule\\_of\\_law\\_index\\_2016.pdf](http://worldjusticeproject.org/sites/default/files/media/wjp_rule_of_law_index_2016.pdf)>, p. 40-41 (Factor 7: Civil Justice). The UK scores 0.56 on Accessibility and affordability (with an overall score on civil justice of .75), see p. 152, whereas the Netherlands scores .78 (with an overall score of .88) and Germany .73 (with an overall score of .86), see p. 117 respectively p. 86.

<sup>26</sup> The UK ranks 6<sup>th</sup> (out of 138 jurisdictions) on this indicator (no. 1.10) in the Global Competitiveness Index 2016-2017, as reported by the World Economic Forum; see <[www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017\\_FINAL.pdf](http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf)>, p. 355. In comparison: the Netherlands ranks 12<sup>th</sup> and Germany 17<sup>th</sup> on this indicator, see p. 277 and p. 187.

<sup>27</sup> Sime & French 2015, p. 1262.

<sup>28</sup> Halsey v. Milton Keynes General NHS Trust [2004] 1 W.L.R. 3002 (CA), as cited by Sime & French 2015, p. 1257. See also PGF v. OMFS [2013] EWCA Civ 1288.

unreasonable refusal of a formal settlement offer, and courts can award additional damages if a judgment is at least as advantageous for a claimant as its earlier offer to settle.<sup>29</sup> Reportedly, settlement rates in England and Wales are high: at least 90% of civil disputes result in a negotiated settlement.<sup>30</sup>

## **5.2 The regulation and supervision of the legal services market**

### **5.2.1 Introduction**

Nowadays, English legal services providers operate in an open and competitive market. There is a vast variety of legal services providers. I will address the regulation and supervision of barristers and solicitors, Claims Management Companies and third-party litigation funders. Funding specificities and these parties' operation in mass litigation will be further discussed in sections 5.4 and 5.5.

I distinguish third-party litigation funders from third parties that employ the assignment model: funding a case by having the original claim owner's right of action transferred to itself and carrying out the litigation in its own name and for its own benefit, or by assignment of the potential proceeds of the action. I will refer to such parties as special purpose vehicles. As assignment and bundling of claims by special purpose vehicles is governed by private law and no specific regulatory requirements apply, I will discuss this topic separately (section 5.4.6).

### **5.2.2 Solicitors and barristers**

In England and Wales, three general types of practising lawyers operate on the legal services market: barristers, solicitors and legal executives.<sup>31</sup> A legal executive supports solicitors and barristers, and often carries out more routine legal work.<sup>32</sup> Historically and generally, a solicitor was a general practitioner that provided legal advice outside of the courts or appeared in the Magistrate's or County Courts. Barristers, retained by a solicitor, had the right of audience to present a case in the higher courts.<sup>33</sup> However, since the 1990 Courts and Legal Services Act, the 1999 Access to Justice Act, and the 2007 Legal Services Act (LSA 2007), which, *inter alia*, implemented the government's policy to break down the historical monopolies of solicitors and barristers, the distinction between both legal professions is less clear.<sup>34</sup> Nowadays, both barristers and solicitors tend to specialize in certain areas of the law and can acquire the right to litigate before any court, although the higher courts are still

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<sup>29</sup> CPR Part 36, LASPO, section 55, and the Offers to Settle in Civil Proceedings Order 2013. See, for instance, Sime & French 2015, p. 1096 ff. See also CPR 1.4(2)(e) and PD Pre-action Conduct and Protocols, paras 3(d), 8 and 9. Non-compliance can be addressed with a cost sanction; see Sime & French 2015, p. 1268-1269. See also LASPO 2012, section 11(5), which states that any criteria on the qualification for civil legal aid must reflect the principle that, in many disputes, mediation and other forms of dispute resolution are more appropriate than legal proceedings.

<sup>30</sup> See Reimann 2012, p. 19, Hodges, Vogenauer & Tulibacka 2010, p. 95, and Jackson 2009, Chapter 6.

<sup>31</sup> Other parties entitled to practise law include licenced conveyancers, patent and trade mark lawyers, costs lawyers and notaries. For an overview, see Boon 2014, Chapter 4, section IV.

<sup>32</sup> The difference between a legal executive and a paralegal is that the latter is not necessarily vocationally qualified as a lawyer. See <cilexcareers.org.uk/>.

<sup>33</sup> See for more details, for instance, Slapper & Kelly 2015, Chapter 16, and for a historical overview, Boon 2014, Chapters 2 and 3.

<sup>34</sup> See Slapper & Kelly 2015, Chapter 16, and Boon 2014, Chapter 3, for an overview of the recommendations in the 2004 Clementi Review of the regulation of the legal profession, and the implementation thereof in the LSA 2007.

very much the domain of barristers. Legal executives and other authorised persons can now also obtain the right of audience in court and undertake other so-called 'reserved legal activities', as long as they have been authorised by an approved regulatory body.<sup>35</sup> General legal advice is unreserved and, thus, can be provided by anyone; other than for the aforementioned authorised persons and Claims Management Companies (see hereafter section 5.2.3) it is not subject to specific regulation.<sup>36</sup>

The LSA 2007 reduced solicitors' and barristers' regulatory autonomy by introducing the Legal Services Board: a regulator that oversees all lawyers and their 'front line' regulators.<sup>37</sup> The latter regulator for solicitors is the Solicitors Regulation Authority (SRA),<sup>38</sup> for barristers it is the Bar Standards Board (BSB). The LSA 2007 lists eight regulatory objectives and five professional principles.<sup>39</sup> Authorised persons are required to, inter alia, protect and promote the public interest and those of consumers, support the rule of law, and adhere to professional principles such as independence and integrity.<sup>40</sup> In addition, the SRA Handbook (which consists of the SRA Principles and the SRA Code of Conduct 2011), respectively the BSB Handbook (which includes the BSB Code of Conduct) lay down professional and ethical rules and standards that solicitors and barristers must comply with.<sup>41</sup> Both further address topics such as integrity, independence and publicity, as well as fee arrangements. The remuneration of solicitors will be discussed in sections 5.3.2 and 5.4.3. At this juncture, I will briefly address some related topics.

As for publicity, since 1984, solicitors are allowed to advertise their services. At the time, legal advertising was described as being 'destined for relative obscurity' as it was perceived to go against professional dignity.<sup>42</sup> Increasingly, however, competition in the legal services market has made advertising commonplace.<sup>43</sup> Publicity by solicitors and barristers needs to adhere to the general standard that it is not misleading and is sufficiently informative to ensure a client's informed choice.<sup>44</sup> An unsolicited direct approach to potential clients is not allowed. This is related to the former common law offence of barratry (the act of stirring up litigation, in particular by vexatiously soliciting potential clients; also

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<sup>35</sup> LSA 2007, sections 1(4), 12, 13(2) and 20, and the accompanying Schedules. The reserved activities are the exercise of a right of audience, conducting of litigation, reserved instrument activities, probate activities, notarial activities and the administration of oaths. See also footnote 24.

<sup>36</sup> Boon 2014, Chapter 4, section III under A. On this topic, see also the SRA's response to the public consultation on the revision of the SRA Code of Conduct (p. 7 ff); see footnote 41.

<sup>37</sup> LSA 2007, Part 2.

<sup>38</sup> Formerly known as the Law Society Regulation Board.

<sup>39</sup> LSA 2007, Part 1.

<sup>40</sup> LSA 2007, section 1.

<sup>41</sup> Available at <[sra.org.uk/solicitors/handbook/code/content.page](http://sra.org.uk/solicitors/handbook/code/content.page)> and <[barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/](http://barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/)>. The SRA Code of Conduct is currently under revision. A new version is expected to be issued in 2017, including new Account Rules. The proposed changes do not seem to alter the principles discussed here. See the consultation documents at <[sra.org.uk/sra/consultations/code-conduct-consultation.page#download](http://sra.org.uk/sra/consultations/code-conduct-consultation.page#download)>.

<sup>42</sup> See Harris 1985, p. 350.

<sup>43</sup> See, for instance, Lewis, Morris & Oliphant 2006, p. 172, Hodges 2009a, p. 110.

<sup>44</sup> SRA Code of Conduct 2011, Chapter 8 and BSB Code of Conduct, rC19 (see also gC57).

known as ambulance chasing),<sup>45</sup> which was abolished in England and Wales in 1967.<sup>46</sup> As of 2004, solicitors are allowed to pay referral fees to third parties such as claims management companies that have referred potential claims to them.<sup>47</sup> The main aim thereof is to remedy the information asymmetry between legal services providers and consumers on the quality of services. However, in practice, referrers predominantly referred cases to the highest bidder and the fees had an inflating effect on litigation costs, in particular in personal injury litigation. Moreover, referrers' advertising practices fuelled the - perception of – a claim culture. Following Jackson's recommendation, referral fees in personal injury cases are now once again prohibited since 2013.<sup>48</sup>

Solicitors are obliged to inform clients in such way that they can make an informed decision, which includes providing information about the costs of the services to be provided.<sup>49</sup> The SRA Code of Conduct indicates that this includes informing a client about its eligibility for public legal aid, or the possibility for an insurance or third party, such as a trade union, to cover the costs.<sup>50</sup> Most likely, the possibility of third-party litigation funding falls within the scope of such information.<sup>51</sup> As litigation funding is still a relatively new phenomenon, the lack of knowledge about such funding on the side of the solicitor might hamper this 'indicated behaviour'. Litigation funding brokers have been keen to fill this knowledge gap.<sup>52</sup>

Solicitors and barristers are required to separate money received, held or dealt with for clients or other persons.<sup>53</sup> A professional indemnity insurance is compulsory.<sup>54</sup>

The LSA 2007 also introduced the Office for Legal Complaints, which incorporates the Legal Ombudsman: an independent ombudsman that is authorized to deal with consumer complaints about authorised persons, including their bill – unless it concerns court proceedings, as only a court can assess such

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<sup>45</sup> For instance, in July 2017, a UK law firm suspended two of its employees for putting up posters offering legal support to victims of the Grenfell Tower fire; see <[theguardian.com/uk-news/2017/jul/07/law-firm-leigh-day-suspends-two-staff-over-grenfell-tower-poster](http://theguardian.com/uk-news/2017/jul/07/law-firm-leigh-day-suspends-two-staff-over-grenfell-tower-poster)>.

<sup>46</sup> Together with maintenance and champerty, see section 5.4.2.

<sup>47</sup> SRA Code of Conduct 2011, Chapter 9. Barristers are not allowed to pay or receive referral fees, see BSB Code of Conduct, rC10.

<sup>48</sup> LASPO 2012, section 56. See Jackson 2010, Chapter 20. The ban also applies to regulated persons under the CILEx, see the Referral Fees (Regulators and Regulated Persons) Regulations 2014. The Lord Chancellor can make regulations to extend the ban to other types of claims and legal services. This power has not been used; see Ministry of Justice, *Legal Aid, Sentencing and Punishment of Offenders Act 2012: Post-Legislative Memorandum*, October 2017, p. 94.

<sup>49</sup> SRA Code of Conduct 2011, Chapter 1. See also section 5.3.2.

<sup>50</sup> SRA Code of Conduct 2011, IB(1.16). See also the predecessor of the code, the 2007 Code of Conduct, which encompasses a more explicit reference to this duty in Rule 2.03(d) and (g).

<sup>51</sup> See Rowles-Davies 2014, p. 196 and Friel, Barnes & Bird 2016, p. 25.

<sup>52</sup> Rowles-Davies 2014, p. 106 ff.

<sup>53</sup> SRA Account rules 2007, and BSB Code of Conduct rC73-75.

<sup>54</sup> SRA Indemnity Insurance Rules and BSB Code of Conduct rC76.

a bill.<sup>55</sup> Professional misconduct by solicitors and barristers is dealt with by the Solicitors/Bar Disciplinary Tribunal.<sup>56</sup> A notorious example of the SRA's supervisory activities is its case against Leigh Day and three of its solicitors brought before the Solicitors Disciplinary Tribunal for alleged professional misconduct, including entering into prohibited referral fee and fee-sharing arrangements with another solicitor/law firm and a referrer.<sup>57</sup> Leigh Day specializes in public interest litigation, and the case at hand revolved around the alleged torture and murder of Iraqi civilians by the British army in 2004. Some of these claims were later found to be fictitious.<sup>58</sup> All parties involved in the contested arrangements had an interest in (a successful outcome of) the private law claims; Leigh Day due to the CFA with its clients,<sup>59</sup> the other law firm and referrer due to their fee arrangements with Leigh Day, parts of which were only payable upon success. Ultimately, in its 213-page judgment, the tribunal cleared Leigh Day and its partners of all misconduct charges. The other solicitor, however, was found guilty of similar charges, which in addition to improper fee arrangements included unsolicited direct approaches to potential clients. He was struck off as a solicitor and the firm that he had founded was closed.<sup>60</sup> The SRA has announced that it will appeal the tribunal's decision against Leigh Day.<sup>61</sup>

Solicitors and barristers can also be held liable for professional negligence.<sup>62</sup> For instance, in 2016, the High Court held a law firm which had acted for claimants in a group action (GLO) negligent due to its failure to sufficiently secure the distribution of a (court-approved) settlement sum, as it had deposited the full sum into a bank account in the Ivory Coast. As a result of the negligence, part of the settlement award had been lost to fraud, and some 6,624 claimants failed to receive the compensation to which they were entitled.<sup>63</sup> In the spin-off to another notorious case (Excalibur), a third-party funder held a large law firm professionally liable for overstating the claim's prospect of success. The case was settled

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<sup>55</sup> LSA 2007, Part 6. See also Slapper & Kelly 2015, sections 16.3.3 and 16.6.7. On the assessment of litigation costs, see sections 5.3.2 and 5.3.4.

<sup>56</sup> Solicitors Act 1974, section 46. The Bar Disciplinary Tribunal is organized by the Bar Tribunals and Adjudication Services and governed by the Disciplinary Tribunal Regulations 2009, see <[barstandardsboard.org.uk/complaints-and-professional-conduct/disciplinary-tribunals-and-findings/the-disciplinary-tribunal-process/](http://barstandardsboard.org.uk/complaints-and-professional-conduct/disciplinary-tribunals-and-findings/the-disciplinary-tribunal-process/)>. See also Boon 2014, Chapter 8, Part VI, under A-C.

<sup>57</sup> Therewith infringing the – then – applicable Code of Conduct 2007, rules 9.01(2), (4) and 9.02. On these aspects of the case, see Solicitors Disciplinary Tribunal 22 September 2017, Case No. 11502-2016 (SRA v. Day and others), p. 22-25, and p. 128-181.

<sup>58</sup> This was the outcome of the Al-Sweady Inquiry, a public inquiry into the allegations of torture and murder by UK soldiers in Iraq.

<sup>59</sup> On CFAs, see also sections 5.3.5.2 and 5.4.3.1.

<sup>60</sup> Solicitors Disciplinary Tribunal 23 March 2017, Case No. 11510-2016 (SRA v. Shiner).

<sup>61</sup> See A. Rogers, 'SRA will appeal decision to clear Leigh Day over Iraq war claims', *The Lawyer*, 15 November 2017.

<sup>62</sup> In 2000, the House of Lords no longer upheld advocates' immunity from such a suit. Barristers (or others with advocacy rights) can also be held liable for negligence since then. See *Hall and Co v. Simons and Other* [2000] 3 W.L.R. 543 (HL); see also Slapper & Kelly 2015, section 16.5.1.

<sup>63</sup> *Agouman v. Leigh Day* [2016] EWHC 1324 [2016] P.N.L.R. 32 (QB). Due to various uncertain circumstances, the court did not (yet) rule on the quantum of damages. On the *Trafigura* case, see also sections 1.1.1, 5.3.5.2 and 5.3.5.5.



out of court.<sup>64</sup> In addition, the law firm is currently under the SRA's scrutiny over the firm's alleged conflict of interest due to one of its partners' relationship with one of the litigation funders and the conditional fee agreement between the law firm and Excalibur.<sup>65</sup>

Law firms increasingly cooperate with entrepreneurial parties, on a national and international basis, and not only in specific cases where a client acquires funding. For instance, in 2017, the UK's leading litigation funder and a top 100 UK law firm entered into a portfolio litigation funding arrangement.<sup>66</sup> The regulation and supervision of litigation funders will be discussed hereafter,<sup>67</sup> but insofar as law firms are involved the SRA and BSB supervise these practices as well.

### 5.2.3 Claims Management Companies

Within the context of this research, another relevant type of legal services provider is the Claims Management Company (CMC). Claims management services are defined as advice or other services in relation to the making of a claim, which includes the provision of financial services or assistance, legal advice or representation, and referring claimants to others in exchange for a fee.<sup>68</sup> CMCs thus offer a range of services, and do so mainly in the area of personal injuries and financial products and services, often by dealing with a large number of similar claims. Currently, 1,388 CMCs are authorised, of which approximately 50% operate in the financial claims sector.<sup>69</sup> The number of authorised CMCs has been declining since 2011 when the CMR registered 3,213 authorised CMCs. CMCs cannot have a right of audience, but mainly act as intermediaries between litigants and lawyers.<sup>70</sup> As to financial claims, CMCs mainly operate by addressing the client's opponent directly or taking its complaint to the Financial Ombudsman.

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<sup>64</sup> See Bernal, N., 'Clifford Chance braces itself for professional negligence claim from Excalibur funders', *The Lawyer* 4 December 2014, and Kinder, T. 'Clifford Chance settles Excalibur professional negligence dispute', *The Lawyer* 9 December 2015. See also *Excalibur v. Texas Keystone and Others* [2016] 1 W.L.R. 2221 (CA), in particular paras 9 and 30. The Excalibur case is discussed more elaborately in sections 5.3.4.3 and 5.3.6.2.

<sup>65</sup> Rogers, A., 'CC hires Clydes as SRA launches probe into firm's handling of Excalibur', *The Lawyer* 6 July 2017.

<sup>66</sup> 'Shepherd and Wedderburn secure 'substantial eight figure' Burford litigation finance deal', 31 July 2017, *Legal Business Blog*, <[legalbusiness.co.uk/index.php/lb-blog-view/10556-shepherd-and-wedderburn-secure-substantial-eight-figure-burford-litigation-finance-deal](http://legalbusiness.co.uk/index.php/lb-blog-view/10556-shepherd-and-wedderburn-secure-substantial-eight-figure-burford-litigation-finance-deal)>. See also the deals between a UK funder and US law firm, <[thelawyer.com/woodsford-seals-litigation-funding-deal-us-boutique/?cmpid=dnews\\_3798632&adg=C2B2303D-EC46-4163-B0F6-4C79D3A0DD57](http://thelawyer.com/woodsford-seals-litigation-funding-deal-us-boutique/?cmpid=dnews_3798632&adg=C2B2303D-EC46-4163-B0F6-4C79D3A0DD57)>, and a funder's deal with a US/UK law firm that has opened a German office to fund German claims, <[hausfeld.com/news/global/hausfeld-and-burford-capital-announce-30-million-german-venture](http://hausfeld.com/news/global/hausfeld-and-burford-capital-announce-30-million-german-venture)>.

<sup>67</sup> See section 5.2.4 and section 5.4.4.

<sup>68</sup> Compensation Act 2006, section 4. See also the Compensation (Regulated Claims Management Services) Order 2006, section 4, the Compensation (Claims Management Services) Regulations 2006, and <[gov.uk/government/groups/claims-management-regulator](http://gov.uk/government/groups/claims-management-regulator)>.

<sup>69</sup> Ministry of Justice, *Claims Management Regulation Annual Report 16/17*, p. 15, 19 and 21, and Ministry of Justice, *Claims Management Regulation – Consultation. Cutting the costs for consumers – Financial Claims*, 2016, p. 8.

<sup>70</sup> See Tzankova & Kortmann 2010, p. 118-119, and Peysner 2014, p. 71. For a detailed description of the activities of a large CMC, see *Claims Direct Test Cases* [2003] EWCA Civ 136. In essence, Claims Direct provided (bulk) claims handling services to personal injury victims, aided by its network of franchise claims managers, solicitors and medical experts. See also section 5.5.1 on the bank charges case.

CMCs started to flourish in the 1990s, in particular after conditional fee arrangements were made possible,<sup>71</sup> and originate from so-called referral agencies that commercialised marketing and advertising to capture personal injury victims and then referred them to law firms. Initially, CMCs were welcomed as user-friendly competitors of solicitors,<sup>72</sup> but at one point the tables turned. The acronym CMC became ‘synonymous with greed, fraud and dishonesty’ and ‘ambulance chaser’:

*‘The bad apples, it seemed were not just a few, but an orchard full of them, and this unleashed a wave of continuous bad publicity.’<sup>73</sup>*

After failed attempts to allow the market to regulate itself,<sup>74</sup> the government created the Claims Management Regulator (CMR), which forms part of the Ministry of Justice.<sup>75</sup> The CMR is responsible for licensing, regulating and supervising CMCs. The CMR has issued various regulations and guidance, covering, inter alia, advertising, advising and representing clients, client accounts, claims referral,<sup>76</sup> and complaints handling.<sup>77</sup> In its earlier years, the CMR was said to be ‘without teeth’ as it had little enforcement powers.<sup>78</sup> This has improved as of 2014, when the Conduct of Authorised Persons Rules 2014 (CAPR) entered into effect. The CMR’s Annual Report 2016/2017 reports ‘significant levels of frontline regulatory activity’, ‘more investigations into non-compliant CMCs than in any previous year’, and an increase in capacity ‘to identify, investigate and take enforcement action against unauthorised CMCs’.<sup>79</sup> In the period reported on, 69 licences were cancelled, 196 warnings were issued, and a total of £ 1.1 million in financial penalties were imposed. Reports of and complaints about nuisance calls, a compliance priority, are said to have notably decreased.<sup>80</sup> The CMR cooperates with, inter alia, the SRA to address solicitors that accept cases generated by CMCs.<sup>81</sup>

The CAPR lay down ethical and professional minimum standards for CMCs. It encompasses the general principle for the business to conduct itself with honesty and integrity, and to act responsibly and with professional diligence, to investigate the merits of a potential claim and to refrain from making fraudulent, false or misleading claims.<sup>82</sup> CMCs that operate in the personal injury market are obliged to have

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<sup>71</sup> See section 5.4.2.1.

<sup>72</sup> Peysner 2014, p. 72.

<sup>73</sup> Wigmore 2013, p. 249-250.

<sup>74</sup> Ministry of Justice, *Claims Management Regulation – Consultation. Cutting the costs for consumers – Financial Claims*, 2016, p. 8. See also Department for Constitutional Affairs, *Tackling the “Compensation Culture”. Government response to the Better Regulation Task Force Report: ‘Better Routes to Redress’*, 10 November 2004, response to Recommendation 1.

<sup>75</sup> It did so with the introduction of (Part 2 of) the Compensation Act 2006, which is accompanied by Regulations and Orders. See, for instance, Herbert 2006, p. 243 ff.

<sup>76</sup> Which is no longer allowed in personal injury claims; LASPO, section 56. See also sections 5.2.2 and 5.4.4.

<sup>77</sup> Available at <gov.uk/guidance/claims-management-company-regulations-guidance-and-legislation>.

<sup>78</sup> The Conduct Rules – and the accompanying detailed guidance note – are available at <gov.uk/government/publications/claims-management-regulation-conduct-of-authorised-person-rules-2014>. See also Isaacs & Alanizy 2015.

<sup>79</sup> Ministry of Justice, *Claims Management Regulation Annual Report 16/17*, p. 5, 13 and 16.

<sup>80</sup> Ministry of Justice, *Claims Management Regulation Annual Report 16/17*, p. 7, 13 and 27 ff.

<sup>81</sup> Ministry of Justice, *Claims Management Regulation Annual Report 16/17*, p. 14.

<sup>82</sup> CAPR, General Rules 1 and 2.

professional indemnity insurance.<sup>83</sup> CMCs need competent staff,<sup>84</sup> and are required to maintain separate client accounts.<sup>85</sup> Furthermore, the CMR has issued rather detailed guidance on marketing methods. Generally, any information provided to existing and prospective clients needs to be clear, transparent, fair and not misleading.<sup>86</sup> There is even advertising guidance on how (not) to advertise 'no win, no fee' claims.<sup>87</sup> Complaints about CMCs can be made to the Legal Ombudsman; for the purpose of legal complaints, authorised CMCs are treated as authorised persons under the LSA 2007.<sup>88</sup> Within that context, the aforementioned regulatory objectives also apply to CMCs.<sup>89</sup>

In spite of the increasing regulatory oversight, problems with CMCs have yet to end. Various policy reforms have been announced. This will be further discussed in section 5.4.4.

### 5.2.4 Third-party litigation funders

The third market player that will be discussed, the third-party litigation funder, operates at the crossroads of legal and financial services. Although its history goes further back, the impetus for litigation funding in England and Wales was the introduction of CFAs in 1995. Further boosts came from the endorsement of the judiciary (notably the Arkin case in 2005), the CJC, and Sir Rupert Jackson.<sup>90</sup>

Since 1999, the CLSA 1990 defines a Litigation Funding Agreement (LFA) as an agreement under which a funder agrees to fund (in whole or in part) the provision of advocacy or litigation services (by someone other than the funder) to a litigant, and under which the litigant agrees to pay a sum to the funder in specified circumstances.<sup>91</sup> However, this statutory provision is not (yet) in force. The Association of Litigation Funders (ALF) Code of Conduct – see hereafter – defines a litigation funder as (the corporate subsidiary of) someone with immediate access to funds within its control, or someone who acts as the exclusive investment advisor to an associated entity or entities that have immediate access to funds within its or their control.<sup>92</sup> Either way, it funds the resolution of disputes in England and Wales and can enable a party to a dispute to meet the costs of various types of dispute resolution procedures, including litigation. In return, the litigation funder or associated entity receives a share of the proceeds in the case of success, as defined in the LFA.

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<sup>83</sup> CAPR, General Rule 7.

<sup>84</sup> CAPR, General Rules 3 and 4.

<sup>85</sup> Pursuant to the Client Account Rules 2006, available at <[gov.uk/government/publications/claims-management-companies-rules-for-handling-client-accounts](http://gov.uk/government/publications/claims-management-companies-rules-for-handling-client-accounts)>.

<sup>86</sup> CAPR, Client Specific Rule 1(c).

<sup>87</sup> See <[asa.org.uk/resource/no-win-no-fee-claims.html](http://asa.org.uk/resource/no-win-no-fee-claims.html)>. The guidance is issued by the Committees of Advertising Practice, which is part of the Advertising Standards Authority.

<sup>88</sup> LSA 2007, section 161 in conjunction with Part 6, and Schedule 19. See also section 5.2.2.

<sup>89</sup> LSA 2007, Part 1.

<sup>90</sup> See *Arkin v. Borchard Lines* [2005] 1 W.L.R. 3055 (CA), the CJC Reports *Improved Access to Justice – Funding Options & Proportionate Costs* of August 2005 (Napier e.a. 2005) and June 2007 (Napier e.a. 2007), and Jackson 2009 and 2010 (Chapters 15 respectively 11). See also Rowles-Davies 2014, Chapter 2, Pirozzolo 2014, p. 156-158, and section 5.4.5.

<sup>91</sup> CLSA 1990, section 58B, as inserted by the Access to Justice Act 1999, section 28.

<sup>92</sup> ALF, *Code of Conduct for Litigation Funders*, January 2014, section 2.

According to the Court of Appeal, a commercial litigation funder can be distinguished from a so-called pure funder:

*'(...) being those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course'*<sup>93</sup>

The difference between the two types is relevant for various costs rules, which will be discussed in section 5.3.

Litigation funders mainly focus on commercial claims and corporate clients because, for one thing, funding consumers might lead to regulation by the regulator and the supervisor of the financial (services) markets in the UK, the Financial Conduct Authority (FCA).<sup>94</sup> In mass litigation, the use of litigation funding is not yet commonplace, but changes on the horizon are noticeable.<sup>95</sup> In addition to the general growth of the litigation funding market (see hereafter), this correlates with recent and potential future reforms of collective redress mechanisms. This will be further discussed in sections 5.4.5 and 5.5. Currently, the FCA generally does not have authority over litigation funding,<sup>96</sup> unless the litigation funder acts as an investment advisor.<sup>97</sup> The CLSA 1990 specifies that additional regulation might require a litigation funder to be approved by a designated body, but such a regulation has not been drafted.<sup>98</sup> Litigation funders often staff solicitors or other professionals that are regulated by their own professional bodies.<sup>99</sup> Although there are similarities between LFAs and damages-based agreements (DBAs), and between litigation funding and claims management services, the DBA Regulations 2013 are said not to apply to litigation funders.<sup>100</sup>

In 2011, the ALF was established as a self-regulatory body, following the recommendations of a CJC Working Party.<sup>101</sup> Membership is not compulsory.<sup>102</sup> Currently, there are eight litigation funders listed

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<sup>93</sup> Hamilton v. Al Fayed (No. 2) [2002] EWCA Civ 665 (CA), p. 1194.

<sup>94</sup> Jackson 2010, p. 121.

<sup>95</sup> Rowles-Davies 2014, p. 142.

<sup>96</sup> Cf. Lord Jackson's recommendation to only introduce statutory regulation by the FCA (then known as the FSA) if self-regulation does not work. See Jackson 2010, p. 124.

<sup>97</sup> Mulheron 2014, referring to Bayens v. Kinross Gold Corporation [2013] ONSC 4974, consideration 4. See also Hodges, Peysner & Nurse 2012, p. 149.

<sup>98</sup> Mulheron 2014, p. 595.

<sup>99</sup> Friel, Barnes & Bird 2016, p. 26. On the regulation and supervision of solicitors and barristers, see section 5.2.2.

<sup>100</sup> As – convincingly – argued by Mulheron 2014, p. 592 ff. The CJC notes that it is foreseeable that in due course some funders might also offer claims management services, such as book-building of shareholders' claims. To avoid satellite litigation on this point, the CJC has recommended to explicitly exclude third-party funders from the ambit of the DBA Regulations; see Mulheron e.a. 2015, p. 33-35. The DBA Regulations will be further discussed in section 5.4.3.2.

<sup>101</sup> Which issued the CJC Report, *Improved Access to Justice – Funding Options & Proportionate Costs*, of June 2007 (Napier e.a. 2007), its Consultation Paper, *A Self Regulatory Code for Third Party Funding*, of July 2010, and the 2011 Code of Conduct for Litigation Funders, revised in 2014. The ALF is governed by its Articles of Association and Rules of the Association, available at <[judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/third-party-funding/](http://judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/third-party-funding/)>.

<sup>102</sup> A compulsory system of self-regulation might be problematic in light of competition law, see Mulheron 2014, p. 579.

as member of the ALF.<sup>103</sup> The August 2017 issue of *Litigation Funding* lists some 11 more funders. Most likely, this overview does not show all of the players;<sup>104</sup> the market development is said to be at the early adopter stage and the market is likely to continue to grow.<sup>105</sup> In addition, related activities are emerging, such as those of litigation funding brokers, who intermediate between funders and potential claimants, and legal pricing consultants.<sup>106</sup>

ALF members are regulated by the Code of Conduct for Litigation Funders as issued by the CJC in 2011, and they are supervised by the ALF.<sup>107</sup> The Code of Conduct addresses the following key topics, which will be discussed hereafter: the capital adequacy of funders, control of litigation or settlement, and the termination of the LFA.<sup>108</sup> As funders do not provide advice, they are not obliged to have professional indemnity insurance.<sup>109</sup> Promotional literature must be clear and not misleading.<sup>110</sup>

To make sure that a funder can meet its funding obligations towards its clients and – if so ordered<sup>111</sup> – successful defendants, the Code of Conduct requires that a third-party funder has sufficient financial resources. This entails that a funder should maintain access to adequate financial resources, at all times, to meet its obligations and those of its subsidiary or associated entity to fund all the disputes that they have agreed to fund.<sup>112</sup> The code further specifies this requirement by, for instance, requiring a funder to have access to a minimum capital of £ 5 million.<sup>113</sup> The funder has a continuous disclosure obligation in respect of its capital adequacy, and it is required to submit to annual auditing.<sup>114</sup>

As for the controlling powers of a funder, the code of conduct stipulates that a funder cannot take steps that (might) cause the funded party's solicitor or barrister to act in breach of their professional duties, nor seek to influence the solicitor or barrister to cede control or the conduct of the dispute to the funder.<sup>115</sup> These rules relate to the – remainder of the – doctrines of maintenance and champerty. Nevertheless, a certain input by the funder is increasingly allowed. This will be further discussed in section 5.4.2 and 5.4.5.

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<sup>103</sup> Augusta Ventures, Burford Capital, Calunius Capital, Harbour Litigation Funding, Redress Solutions, Therium Capital Management, Vannin Capital, and Woodsford Litigation Funding. See <associationoflitigationfunders.com/>.

<sup>104</sup> Pirozzolo 2014, p. 160. See also, for instance, the *Excalibur* judgment, which addresses other funders; *Excalibur v. Texas Keystone and Others* [2016] EWCA Civ 1144. This judgment is discussed in section 5.4.5.

<sup>105</sup> Pirozzolo 2014, p. 156, Burford Annual Report 2016, p. 4-7. See also section 5.4.5.

<sup>106</sup> See the aforementioned *Litigation Funding* list.

<sup>107</sup> The Code of Conduct for Litigation Funders is available at <associationoflitigationfunders.com/documents/> (version November 2014, as amended in November 2016).

<sup>108</sup> See also section 5.4.5.

<sup>109</sup> Mulheron 2014, p. 574.

<sup>110</sup> Code of Conduct for Litigation Funders, section 6.

<sup>111</sup> See section 5.3.6.

<sup>112</sup> Code of Conduct for Litigation Funders, section 9.4.

<sup>113</sup> Or such other amount as stipulated by the ALF; Code of Conduct for Litigation Funders, section 9.4.2. Between November 2014 and November 2016, this amount increased from £ 2 million to £ 5 million.

<sup>114</sup> Code of Conduct for Litigation Funders, section 9.4.3 and 9.4.4.

<sup>115</sup> Code of Conduct for Litigation Funders, sections 9.2 and 9.3.

Third, the code of conduct strictly and imperatively determines the grounds for terminating an LFA. Termination can only take place if the funder<sup>116</sup> reasonably i) ceases to be satisfied about the merits of the dispute, ii) believes that the dispute is no longer commercially viable, or iii) believes that there has been a material breach of the LFA by the funded party.<sup>117</sup> Examples of reasons to terminate an LFA are a significant escalation of litigation costs or a reduction of the likely recovery from what parties anticipated at the outset.<sup>118</sup> The funder remains liable for all funding obligations up to the termination date, unless ground iii) applies.<sup>119</sup>

Disputes between an ALF funder and a funded party about the settlement or termination of the LFA should be resolved by a Queen's Counsel through binding opinion.<sup>120</sup> As far as I have been able to ascertain, data on the use of such proceedings are not in the public domain. The code of conduct does not require litigation funders to disclose such information. In addition to the so-called QC clause (binding opinion), the ALF maintains a complaints procedure for conflicts between a funder and a litigant.<sup>121</sup> The complaints procedure thus has a broader scope than the QC clause, as the latter only covers a conflict between the funder and the funded party, and only about the settlement or termination of the LFA. Complaints are dealt with initially by the ALF's General Counsel, and subsequently by the ALF's board or independent legal counsel. Public information on complaints is unavailable, but the procedure is said to have never been used thus far.<sup>122</sup>

As mentioned, not all litigation funders are ALF members. Non-members are governed by ordinary civil law, in particular the – remainder of the – doctrines of maintenance and champerty, and by – ad hoc – judicial supervision. For instance, a funded party can bring a claim in contract to court. So far, the topic of contract termination by a third-party litigation funder has been addressed in the courts in only one case. The court apparently expected otherwise, judging by its reference to the case as 'a new type of satellite litigation, of which (...) the courts appear likely to see much more'.<sup>123</sup> In the case at hand, the funder had agreed to fund a particular case, but later changed its mind. The LFA stipulated that the funder could terminate the contract if in its reasonable opinion the prospects of success would not exceed 60%. A preliminary opinion had been written by the funded party's solicitor, and had later been supplemented with its – brief – statement that the chances of success exceeded 75%. However, the funder deemed the solicitor's opinion to be insufficient, and instructed an independent legal counsel for advice. Ultimately, taking into account this counsel's advice that the chance of success fell below 60%, the funder terminated the ALF. The court ruled that the funder was allowed to withdraw from

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<sup>116</sup> Or the funder's subsidiary or associated entity.

<sup>117</sup> Code of Conduct for Litigation Funders, sections 11.2 and 12.

<sup>118</sup> Pirozollo 2014, p. 162-163, Friel, Barnes & Bird 2016, p. 26.

<sup>119</sup> Code of Conduct for Litigation Funders, section 13.1.

<sup>120</sup> Code of Conduct for Litigation Funders, section 13.2.

<sup>121</sup> Code of Conduct for Litigation Funders, section 15. The complaints procedure is available at <[associationoflitigationfunders.com/wp-content/uploads/2014/02/ALF-Complaints-Procedure-Final-PDF.pdf](http://associationoflitigationfunders.com/wp-content/uploads/2014/02/ALF-Complaints-Procedure-Final-PDF.pdf)>

<sup>122</sup> Friel, Barnes & Bird 2016, p. 28.

<sup>123</sup> *Harcus Sinclair v. Buttonwood Legal Capital and others* [2013] EWHC 1193 (Ch), consideration 1. For a brief discussion of the case, see also Mulheron 2014, p. 589-590.

the contract. In forming its objective assessment, the funder was not required to invite the funded party to represent on the merits and/or to obtain a further opinion from its legal representative:

*‘The reasonableness of an estimate that the prospects do not exceed 60% is a purely substantive question, to be answered by an objective assessment of the available evidence against the background of the relevant legal rules and principles applicable to the claim. If the estimated figure is by that test within the ambit of reasonableness, it matters not by what route or process it was reached: the result is all.’<sup>124</sup>*

### 5.3 Litigation costs and costs shifting

#### 5.3.1 Introduction

The English legal system is notorious for its complex cost system and high litigation costs. It is said to be one of the most expensive legal orders.<sup>125</sup> Hence, litigation costs have been subject to various reforms in the past decades, aiming to reduce costs and improve access to justice. The reforms coincide with neoliberal and austerity measures that have also incited the development of alternative ways of litigation funding – which will be discussed in section 5.4. Alongside Lord Woolf’s review, the main underlying study is the review of civil litigation costs by Sir Rupert Jackson in 2009.<sup>126</sup> As mentioned, the CPR’s overriding objective instructs parties and the court to keep litigation costs at a proportionate level. Similarly, the LSA 2007 has implemented the obligation for regulated persons such as solicitors and barristers to comply with its regulatory objective of improving access to justice, including conducting litigation at proportionate costs.<sup>127</sup> Nevertheless, ten years after Lord Woolf’s recommendations, it appeared that this goal had yet to be met, as the costs of litigation continued to rise rather than decrease.<sup>128</sup> Growing concerns about the effect of this rise and the so-called cost wars – litigation about cost issues, also known as satellite litigation – on access to justice (and London’s position in the global commercial litigation market)<sup>129</sup> led to the appointment of Lord Justice Jackson to conduct a fundamental review of the costs of civil litigation.<sup>130</sup> The review resulted in a broad range of recommendations on civil costs and funding, which, ultimately, all aim at reducing the costs of civil litigation while safeguarding access to justice in England and Wales.

It is difficult, if not practically impossible, to do justice to the English cost system in an overview. The following sections aim to set out its essentials, focusing on those that are relevant to (the development

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<sup>124</sup> Consideration 43.

<sup>125</sup> See Sime & French 2009, p. 78, and Hodges, Vogenauer & Tulibacka 2010, in particular Case study 7, p. 57 ff. (discussed hereafter). See also the UK’s score in the Rule of Law Index 2016 in the category ‘civil justice’ on ‘Accessibility and Affordability’ as compared to the Netherlands and Germany, as discussed in section 5.1.

<sup>126</sup> The review resulted in a preliminary report (Jackson 2009) and a final report (Jackson 2010). For an overview of earlier reports on cost reforms, see Peysner 2010, p. 291.

<sup>127</sup> LSA 2007, sections 1 and 176. See Jackson 2009, p. 21.

<sup>128</sup> Jackson 2009, p. 1.

<sup>129</sup> Veljanovski 2012, p. 407.

<sup>130</sup> Jackson 2009, p. 2.

of) entrepreneurial mass litigation.<sup>131</sup> Various reforms and developments that have ensued Lord Justice Jackson's recommendations will be addressed: case and costs management, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO; which entered into effect in April 2013 and, inter alia, abolished the recoverability of CFA success fees and ATE premiums, and permitted DBAs),<sup>132</sup> qualified one-way costs shifting in personal injury cases, legal aid cutbacks,<sup>133</sup> and the growth of third-party litigation funding.<sup>134</sup> A recommendation that was not fully implemented, fixed recoverable costs, has been addressed by Jackson in his 2017 Supplementary Report. As it suggests introducing fixed recoverable fees in medium-complex cases up to £ 100,000 and, voluntarily, £ 250,000, this potential reform will be briefly discussed as well.

### 5.3.2 Litigation costs

#### 5.3.2.1 Court charges and lawyers' fees

English court charges are based on the 'pay as you go' principle: court fees are charged from the party that undertakes a specific procedural action, such as requesting the court to issue a claim form (start proceedings) or to fix a trial date or period. For several separate actions, a fee is charged according to a statutory schedule.<sup>135</sup> Notwithstanding the aforementioned reforms to reduce litigation costs, court fees have been increasing as of 2014.<sup>136</sup> The government's aim is to further reduce the taxpayer's subsidy by rendering courts largely self-sustaining:

*'In recent years, it has been the Government's aim that the revenue from court fees should meet the costs of providing the civil courts system, (...) [T]he Government explores whether those who use the courts and who can afford to pay should make a greater contribution towards their cost, so that nearly all of the cost of the civil courts is met through fees.'*<sup>137</sup>

As the increases are said to impose an additional barrier to access to justice, they have been criticised.<sup>138</sup> Nevertheless, the government has adopted the view that most claimants will be able to afford the increased court fees and will not be deterred from bringing their case; at most they will more consciously consider whether to commence court proceedings.<sup>139</sup>

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<sup>131</sup> For detailed accounts of the English civil costs system see, for instance, Peysner 2009, Jackson 2009 and 2010, and Hurst 2013.

<sup>132</sup> A review of the implementation of LASPO is due to take place in early 2018; Ministry of Justice, *Legal Aid, Sentencing and Punishment of Offenders Act 2012: Post-Legislative Memorandum*, October 2017, p. 96 and 97.

<sup>133</sup> Which were not part of Jackson's recommendations, see Jackson 2010, p. 70.

<sup>134</sup> For a full overview of the measures that ensued from Jackson's recommendations, see Jackson 2017, Chapter 2.

<sup>135</sup> Schedule 1 of the Civil Proceedings Fees Order 2008, SI 2008/1053 (L. 5).

<sup>136</sup> Schedule 1 has been amended on several occasions. The most recent one dates from December 2016, see the Civil Proceedings Fees (Amendment) Order 2016, SI 2016/1191 (L. 19). For an overview of the developments, see Jackson 2009, p. 63 ff and Sorabji 2015, p. 160 ff.

<sup>137</sup> Ministry of Justice, *Court Fees: Proposals for reform. Part one consultation response: Cost Recovery* (Cm 8845), April 2014, p. 5.

<sup>138</sup> For an overview, see Sorabji 2015, p. 161, footnote 29.

<sup>139</sup> For a critical comment on the qualitative study – 18 telephone calls – that formed the basis for this conclusion, see Sorabji 2015, p. 161.



Despite the upsurge in court fees, the largest portion of litigation costs consists of the lawyers' fees.<sup>140</sup> Adversarial litigation provides a relatively large role for solicitors and barristers, particularly in the labour-intensive evidence-gathering process, such as the disclosure of documents which, in turn, can create additional costs in the trial phase, such as witness and/or expert costs.<sup>141</sup> Furthermore, lawyers' fees are not regulated, that is, parties can freely negotiate a rate. Despite increasing competition on the legal services market, market forces have been said to insufficiently exert pressure on the rates.<sup>142</sup> The hourly fee remains a common type of remuneration, despite the opportunities for clients and their legal services provider to engage in alternative fee structures – which will be further discussed in section 5.4. Solicitor fee rates are influenced by various factors such as the type of firm, its location (London or elsewhere), and the lawyer's expertise and experience.<sup>143</sup> Peysner notes (in 2010) that a common fee in a complex commercial case is around £ 350, possibly increased by a conditional fee of up to a maximum of 100%, and that solicitors often charge in excess, anticipating a reduction after negotiation or judicial cost assessment.<sup>144</sup> All this renders the litigation costs (and risk) high and unpredictable.

Various instruments have been implemented to reduce litigation expenses and the unpredictability thereof. As to the latter, one of the solicitors' main obligations is to provide a client – at the outset as well as throughout proceedings – with the best possible information about the likely overall cost of the matter, including the risk of having to pay adverse costs.<sup>145</sup> Similar rules apply to the other regulated persons.<sup>146</sup> As for curtailing litigation costs, as mentioned, the overriding objective is to instruct parties and the court to keep the costs at a proportionate level.<sup>147</sup> In addition, the following measures have been introduced to reduce lawyers' fees and to improve the predictability of litigation costs and risks: i) costs management and budgeting, ii) fixed recoverable costs, and iii) costs capping. All measures are applied at the outset or during litigation, and affect the costs order at the conclusion of litigation, which will be discussed in section 5.3.4.

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<sup>140</sup> The overview is limited to contentious costs (costs 'in or for the purposes of proceedings'), which includes preparation costs such as taking instructions or obtaining evidence; see Solicitors Act 1974, section 87(1) and, for instance, Zuckerman 2013, p. 1315-1316. Furthermore, it particularly focuses on solicitor fees. The fees of experts, witnesses and counsel/barrister are referred to as disbursements.

<sup>141</sup> See Jackson 2009, Chapters 40 and 41, in particular p. 382 ff, Hodges, Vogenauer & Tulibacka 2010, p. 93, and Reimann 2012, p. 54. See CPR 44.1(1)(iv) for all costs that can be subject to a costs order.

<sup>142</sup> See Jackson 2009, p. 72, and Zuckerman 2013, p. 1307-1309.

<sup>143</sup> Jackson 2009, p. 85.

<sup>144</sup> Peysner 2010a, p. 140-141. For various types of fee rates, see Jackson 2009, p. 85. See also hereafter on the Guideline Hourly Rates.

<sup>145</sup> SRA Code of Conduct, Chapter 1, O1.13. See also Sime & French 2015, p. 1087. On additional duties to inform if acting under a CFA, see section 5.4.2.

<sup>146</sup> See, for instance, BSB Code of Conduct rC22.1 (see also gC81). See also the guidelines for good costs service, issued by the Legal Ombudsman, and available at <[legalombudsman.org.uk/downloads/documents/publications/Ombudsman-view-good-costs-service.pdf](http://legalombudsman.org.uk/downloads/documents/publications/Ombudsman-view-good-costs-service.pdf)>.

<sup>147</sup> CPR 44.3(2). See also section 5.3.4.

### 5.3.2.2 Measure I: costs management and budgeting

To further the overriding objective, in 2013, the courts' case management toolbox was supplemented with active costs management powers.<sup>148</sup> Courts should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings. This is facilitated by the parties' obligation to file a costs budget at the start of proceedings on claims below £ 10 million (multi-track cases), and the court's power to make a costs management order, at any time, or hold a costs management conference. Costs budgeting is not mandatory in claims that exceed £ 10 million, but parties can still apply for the court to direct budgets and make a costs management order.<sup>149</sup> The conference and/or order can address the revision and approval of the costs budgets, to the extent that the budgets have not been agreed between parties. In complex decisions, the court may consult a costs officer.<sup>150</sup>

Generally, costs management/budgeting does not necessarily affect the actual costs between lawyer and client, as this would (according to Jackson, unacceptably) interfere with the freedom of contract. The restriction of recoverable costs, however, is said to incentivize lawyers – in a competitive market – to keep the actual costs down.<sup>151</sup> Moreover, to a certain extent, the agreed litigation costs between a client and solicitor are subject to the court's scrutiny. The Guideline Hourly Rates has been developed as a benchmark for reasonable hourly fees for solicitors and legal executives.<sup>152</sup> The rates are based upon the location of fee-earners' practice and their experience. For substantial and complex litigation, the circumstances of the case might justify a higher (recoverable) hourly rate.<sup>153</sup> The aim of the guideline was to 'reflect market rates for the level of work being undertaken', intended for summary assessment, but they are used in detailed assessment and costs management as well.<sup>154</sup> Currently, however, the use of the guideline is controversial as it is outdated: it has not been revised since 2010.<sup>155</sup> Nevertheless, costs budgeting and management are said to better control the costs from an early stage of

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<sup>148</sup> CPR, Part 3 II and III.

<sup>149</sup> CPR 3.15(2). See Jackson 2017, p. 134.

<sup>150</sup> See also section 5.3.4.1.

<sup>151</sup> Jackson 2017, p. 11.

<sup>152</sup> For barristers' fees, a guideline has been provided by the Senior Courts Costs Office. The currently applicable 2010 guideline is available at <[gov.uk/guidance/solicitors-guideline-hourly-rates](http://gov.uk/guidance/solicitors-guideline-hourly-rates)>. The guideline is set by the Courts and Tribunals Judiciary, upon advice from the Civil Justice Council (Costs Committee). Before 2012, the guidelines were set by (the government's) HM Courts and Tribunals Service. The Senior Courts Act 1981, section 51(1) gives courts the authority to prescribe costs scales. The Solicitors Act 1974, section 66, states that the determination of the solicitor's remuneration may depend on the skill, labour and responsibility involved in the business done by him.

<sup>153</sup> Sime & French, p. 1222 and (for counsel's fees) p. 1223.

<sup>154</sup> See Jackson 2009 (Vol. 2), p. 542, Jackson 2010, Chapter 44, p. 450 ff, Jackson 2015, under 8.2, and Sime & French 2015, p. 1218-1225. On the types of assessment, see section 5.3.4.3.

<sup>155</sup> Jackson 2009, p. 85. In 2014, the Courts and Tribunals Judiciary (Master of the Rolls) rejected a proposal from the Costs Committee to revise the guideline (which would have resulted in a reduction of the current rates). The main reason for the rejection was the report's insufficiently robust empirical underpinning. Evidence-gathering, apparently, had been difficult; for instance, defence law firms had failed to respond to the CJC's survey. See CJC Costs Committee, *Recommendations on Guideline Hourly Rates for 2014* (Report to the Master of the Rolls), May 2014, and Master of the Rolls, *Guideline Hourly Rates* (Decision Paper), July 2014. Both reports are available at <[judiciary.gov.uk/publications/master-of-the-rolls-decision-and-committees-report-on-guideline-hourly-rates/](http://judiciary.gov.uk/publications/master-of-the-rolls-decision-and-committees-report-on-guideline-hourly-rates/)>.

litigation and to have increased the predictability of both the own client costs and *inter partes* recoverable costs.<sup>156</sup> Generally, a costs order will follow the costs budget.<sup>157</sup> This clarity and predictability explains why, *inter alia*, third-party litigation funders have welcomed costs management. So far, although ‘some practitioners and judges regard the process as tiresome’ and costly, costs management has been evaluated as beneficial, particularly to clients.<sup>158</sup>

One issue that remains problematic within this context is that costs budgets do not address the already incurred pre-issue costs, which can be substantial as well.<sup>159</sup> For claimants, on average, they represent 32% of the total budget figure.<sup>160</sup> Jackson has endorsed suggestions to fix these costs in different categories of cases, but has recommended to withhold action in this area for now, since his recommendations to implement an additional fixed recoverable fee regime (see hereafter) contains – yet another – significant reform.<sup>161</sup>

Costs management and budgeting is used in mass litigation as well.<sup>162</sup> For instance, in the Lloyds shareholder litigation (GLO), the adverse costs risk was expected to exceed the cover of the claimants’ initial ATE insurance.<sup>163</sup> Under a GLO, in the case of loss, the claimants are each severally liable for their portion of the costs.<sup>164</sup> This risk is unattractive for defendants as they would have to collect costs from about 6,000 individuals, ranging from small to institutional investors. Upon the application for a costs management order (the claims exceed the £ 10 million limit), the court made a cost benefit analysis, weighing the costs of making a costs management order (estimated at approximately £ 225,000) against the benefit of certainty on the costs risk exposure. The court concluded that it would be just and in accordance with the overriding objective to require parties to spend money on costs management in order to assess more accurately the level of the further ATE insurance cover or a substitute for this, such as security for costs by the litigation funder involved.<sup>165</sup>

### 5.3.2.3 Measure II: fixed recoverable costs

Controlling recoverable costs in advance can also take place through the fixed recoverable costs regime.<sup>166</sup> Like costs budgeting, this measure does not affect own fees between lawyer and client, yet aims to control litigation costs, create a predictable cost structure, and therewith promote access to justice.<sup>167</sup> Currently, fixed recoverable fees apply to most claims in the fast track (low value claims, up

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<sup>156</sup> Jackson 2016a, p. 130-139.

<sup>157</sup> See section 5.3.4.

<sup>158</sup> Jackson 2016a, p. 131, 134 ff. See also Jackson 2015.

<sup>159</sup> See, for instance, *Yeo v. Times Newspapers* [2015] EWHC 209 (QB), para. 60-61.

<sup>160</sup> See, Jackson 2017, p. 93 ff.

<sup>161</sup> Jackson 2017, p. 97.

<sup>162</sup> See Jackson 2016a, p. 134.

<sup>163</sup> See *Sharp and others v. Blank and others* [2015] EWHC 2681 (Ch) and 2685 (Ch), and *Sharp and others v. Blank and others* [2017] EWHC 141 (Ch). The amount covered is £ 14.75 million, the defendants’ costs are estimated at £ 24 million.

<sup>164</sup> CPR 46.6(3); see section 5.3.6.1.

<sup>165</sup> See section 5.3.3.

<sup>166</sup> CPR Part 45.

<sup>167</sup> Jackson 2017, p. 12. See also Jackson 2010, Part 3.

to £ 25,000) and the small claims track.<sup>168</sup> In 2016, the government commissioned Jackson to consider extending the regime to more complex claims in the multi-track, building on the experience with fixed recoverable fees so far. In the ensuing 2017 supplementary review, Jackson has recommended fixed recoverable fees in all fast track claims, and to implement a new 'intermediate track' for claims of modest complexity up to £ 100,000, also with fixed recoverable fees, and a streamlined procedure to control the work to be done.<sup>169</sup> Public consultation will now follow, but it is likely that the proposed reforms will be implemented, if only to make sure that the UK legal system 'continues to lead the world'.<sup>170</sup> Some have even distilled from recent case law that the courts are moving towards fixed recoverable costs 'for everything', including complex cases.<sup>171</sup> However, the effect of the measure is said to be potentially mitigated through commercial contracts:

*'Most banks and financial institutions already have contractual provisions in their contracts with customers which allow the recovery of all costs on an indemnity basis to be added to the debt rather than sought through the court. As such they are less likely to be affected by the proposed changes. Such provisions negate the entire effect of fixed costs in those claims and may be rolled out more widely in commercial contracts.'*<sup>172</sup>

#### **5.3.2.4 Measure III: costs capping and protective costs order**

A variation on the measures of costs management and fixed fees is costs capping, which has been employed in particular to control litigation costs in advance in multi-party litigation. The Woolf report had already encouraged courts to manage and control costs in multi-party litigation,<sup>173</sup> and the elements that, nowadays, form the basis for costs capping have been developed in the case law.<sup>174</sup> In *AB v. Leeds Teaching Hospitals*, in which a group litigation order (GLO) was issued, the court ruled that its general case management powers included the authority to cap costs in appropriate cases, 'of which GLOs are prime examples', 'particularly where there is a risk that costs may become disproportionate

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<sup>168</sup> See, for instance, Sime & French 2015, Chapter 70.

<sup>169</sup> Jackson 2017, Chapter 7; for the proposed criteria, see p. 101, for the proposed figures at each stage of the proceedings, see p. 106-107.

<sup>170</sup> See the joint statement 'Transforming our justice system' of the then Lord Chancellor, Lord Chief Justice and Senior President of Tribunals of 15 September 2016, p. 3 and 11, and Ministry of Justice, *Transforming our justice system: summary of reforms and consultation*, September 2016, p. 8.

<sup>171</sup> K. Underwood, 'Guideline Hourly Rates', a discussion of *Various Claimants v. MGN* [2016] EWHC B29 (Costs), blog available at <kerryunderwood.wordpress.com/2016/12/09/guideline-hourly-rates>.

<sup>172</sup> M. Clifford & S. Burrows, 'Putting a lid on costs', *Litigation Funding* August 2017.

<sup>173</sup> Woolf 1996, Chapter 17, para. 57.

<sup>174</sup> Since 2009, costs capping has been laid down in the CPR, currently in CPR 3.19 ff. Early encouragement to control or budget costs in multi-party litigation can be found in *Solutia v. Griffiths* [2001] EWCA Civ 736 (CA), *AB v. Leeds Teaching Hospitals* [2003] EWHC 1034 (QB), *Various Ledward Claimants v. Kent & Medway Health Authority* [2003] EWHC 2551 (QB), and *King v. Telegraph Group* [2004] EWCA Civ 613. For an overview, see Jackson 2009, Chapter 45, and Hurst 2010, p. 35 ff.

and excessive.<sup>175</sup> For fast track claims before the CAT, recoverable costs are mandatorily capped at a level to be determined by the Tribunal; however, this does not apply to collective proceedings.<sup>176</sup>

As part of the aforementioned 2017 review, Jackson has recommended also introducing a voluntary capped costs pilot scheme in certain commercial cases up to £ 250,000.<sup>177</sup> In order to control the work to be done within such a cap, the procedure is to be streamlined, for instance, by limiting the number of pages for statements and reports, narrowing disclosure and, where possible, limiting trial days. If successful, 'the regime could be rolled out more widely for use in appropriate cases.'<sup>178</sup> Jackson has taken the experiences of the Intellectual Property Enterprise Court (IPEC) as a source of inspiration. With its 'highly streamlined procedure' and capped recoverable costs regime, the IPEC has increased in popularity as a cost-effective and accessible venue, in particular for SMEs with limited financial resources.

Through a costs capping order, a court can limit the amount of future costs (solicitor costs and disbursements such as counsel and expert fees) that are recoverable in the case of success. In other words, it places a maximum on the adverse costs risk; it does not necessarily affect the own litigation costs. Although costs capping can be a difficult, costly and time-consuming task and carries the risk of tactical behaviour by defendants (to frustrate the pursuit of a claim), it is said to be an effective measure to control costs in advance in certain complex cases.<sup>179</sup> The difficulty of costs capping was expressed in *Knight v. Beyond Properties*.<sup>180</sup> The court stated that costs capping involves a degree of speculation (just like ordering security for costs)<sup>181</sup> and (unlike the latter) has the serious risk of getting it wrong, rendering costs irrecoverable. Any subsequent application to mitigate such a risk would add more litigation costs. Thus, costs capping is only applied in exceptional circumstances, if costs management or a detailed assessment<sup>182</sup> are deemed insufficient; 'the courts should not be troubled by satellite litigation' on costs capping.<sup>183</sup> In assessing the application, the court takes into account all the circumstances of the case, including whether there is a substantial imbalance between the parties' financial position.<sup>184</sup> For the assessment of such a position, the applicant has to provide the court with the full disclosure of its means, including capital assets.<sup>185</sup> However, the 'mere' fact that the case will

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<sup>175</sup> *AB v. Leeds Teaching Hospitals* [2003] EWHC 1034 (QB), paras 18-19.

<sup>176</sup> Competition Appeal Tribunal Rules 2015, section 58(2)(b) and section 74(3)(d). On costs capping in the fast track, see also Department for Business Innovation & Skills, *Private Actions in Competition Law. A consultation on options for reform – government response*, January 2013, p. 22.

<sup>177</sup> Cases before the Business and Property Courts. See Jackson 2017, Chapter 9. He places the cap on recoverable costs at £ 80,000 for solicitor and counsel fees, to be increased to £ 100,000 if the claimant has made a Part 36 offer (on this offer, see section 5.1).

<sup>178</sup> Jackson 2017, p. 10.

<sup>179</sup> Jackson 2009, Chapter 45.

<sup>180</sup> *Knight v. Beyond Properties and others* [2006] EWHC 1242 (Ch), para. 23.

<sup>181</sup> See section 5.3.3.

<sup>182</sup> See section 5.3.4.

<sup>183</sup> CPR 3.19(5)(c), PD 3F 1.1. See also *Smart v. East Cheshire NHS Trust* [2003] EWHC 2806; *Nadia Eweida v. British Airways* [2009] EWCA Civ 1025, and *Tidal Energy v. Bank of Scotland* [2014] EWCA Civ 847.

<sup>184</sup> CPR 3.19(6)(a).

<sup>185</sup> *Wallace v. Crossley* [2009] EWCA Civ 960, para. 4.

not be further pursued in the absence of a costs capping order is insufficient; costs capping is not intended to remedy litigation funding problems.<sup>186</sup> Although it can be applied for at any stage of the proceedings, it is risky to apply at a late stage.<sup>187</sup> The cap should be proportionate to the amount at stake and the complexity of the issues. The costs are capped with a broad approach, and parties' estimates of the costs serve as a guideline.<sup>188</sup> Parties can apply to vary the order in the event of unforeseen or exceptional additional costs, or for a reduction thereof. The order can also include a 'contingency fund', a percentage of the cap for unforeseen circumstances.<sup>189</sup>

A species of costs capping is the protective costs order, which can be made in certain public interest litigation, so-called Aarhus Convention claims, on government accountability and environmental protection.<sup>190</sup> These rules have been introduced to comply with the Aarhus Convention, which states that procedures referred to in the convention shall not be prohibitively expensive.<sup>191</sup> Recently, Jackson has recommended to extend the Aarhus costs capping rules to all judicial review claims.<sup>192</sup> The costs for claimants are currently capped at £ 5,000 for individuals who bring unsuccessful claims and at £ 10,000 for companies that do so. For defendants, the costs are capped at £ 35,000. To protect the certainty of such costs capping and so as not to deter meritorious claims, the provision that courts can vary these amounts can only be made with good reason and at an appropriately early stage of the proceedings.<sup>193</sup> Allowing an order to vary the costs cap depends, *inter alia*, on the financial resources of the claimant. The disclosure of such confidential information should be held in private hearings.<sup>194</sup>

### 5.3.3 Security for costs

Generally, a claimant cannot be ordered to provide security for costs merely because he is poor, 'it being deemed right and expedient that a court of justice should be open to every one.'<sup>195</sup> Nevertheless, there are a number of situations in which a defendant can request the court to make an order for security for costs.<sup>196</sup> The aim of such order is to protect the defendant against an impecunious or, in

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<sup>186</sup> *Black v. Arriva North East* [204] EWCA Civ 1115, para. 11.

<sup>187</sup> *Marion Henry v. BBC* [2005] EWHC 2503 (QB).

<sup>188</sup> *AB v. Leeds Teaching Hospitals* [2003] EWHC 1034 (QB), paras 29-30; *Multiple claimants v. Corby Borough Council* [2008] EWHC 619 (TCC), para. 23.

<sup>189</sup> PD 3F 4.1. See also Jackson 2009, p. 463.

<sup>190</sup> CPR 45.41 ff.

<sup>191</sup> UNECE Convention on access to information, public participation in decision-making and access to justice in environmental matters, 25 June 1998, section 9(4). See also Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, and ECJ 13 February 2014, ECLI:EU:C:2014:67 (*European Commission v. United Kingdom*). On the difference between costs capping and a protective costs order, see *Weir and others v. Secretary of State for Transport and another* (No. 1) [2005] EWHC 812 (Ch) and *Nadia Eweida v. British Airways* [2009] EWCA Civ 1025. On 'public interest' see *R. (on the application of Garner) v. Elmbridge* [2010] EWCA Civ 1006.

<sup>192</sup> Jackson 2017, Chapter 10.

<sup>193</sup> CPR 45.44. See *R. (on the application of Royal Society for the Protection of Birds) v. Secretary of State for Justice* [2017] EWHC 2309 (QB, Admin), paras 28 and 36-41.

<sup>194</sup> A private hearing pursuant to CPR 39.2(3)(c). See *R. (on the application of Royal Society for the Protection of Birds) v. Secretary of State for Justice* [2017] EWHC 2309 (QB, Admin), paras 51-57.

<sup>195</sup> *White and Another v. Butt* [1909] 1 K.B. 50 (CA).

<sup>196</sup> Listed in CPR 25.13 and 25.14.

the words of Andrews, a shifty litigant, and to prevent abusive litigation.<sup>197</sup> The court needs to balance this interest of the defendant against the claimant's interest of having access to justice.<sup>198</sup> An order will be made, for instance, if the claimant is a company that has given the court reason to believe that it will be unable to pay a potential costs order, or if the claimant has taken steps in relation to his assets that would make it difficult to enforce an adverse costs order. The court has to assess whether, in light of all the circumstances, it is just to make an order for security for costs. This can include assessing the merits of the case, but only if the case has a high degree of probability of success or failure – the assessment should not result in conducting a mini-trial.<sup>199</sup> Another factor for the court to consider is whether the claimant can obtain other potential sources of funding to cover the defendant's costs, such as third-party litigation funding.<sup>200</sup> An ATE policy is deemed adequate to provide security, if the cover is sufficient and the terms do not easily enable the insurer to avoid its liability.<sup>201</sup>

The court can order a non-claimant, such as a litigation funder, to provide for security for costs.<sup>202</sup> The court will do so if i) the third party is the original claim owner and has assigned its claim to the claimant in order to escape an adverse costs order, or ii) the third party has agreed to pay the claimant's litigation costs in return for a share of the proceeds and is a person against whom a costs order may be made. Relevant factors for the decision whether to allow security for costs against a non-party are whether:<sup>203</sup>

- it is motivated by its commercial interest in litigation (as opposed to a 'pure funder' with an altruistic motive);<sup>204</sup>
- there is a real (not fanciful) risk of non-payment;
- there is a sufficient link between the funding and the costs for which recovery is sought;
- the non-party knows or should know of the risk of liability for costs.

The key factor is whether the funder is potentially liable as a non-party for an adverse costs order. In entrepreneurial mass litigation, a costs order against a non-party is not uncommon.<sup>205</sup>

Upon application, a court can order a claimant to disclose the identity and address of a litigation funder which would fall under this category.<sup>206</sup> Such disclosure is not compulsory. The disclosure of assistance by a litigation funder does not – improperly – interfere with a claimant's right to private life (art. 8

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<sup>197</sup> CPR 25.12-25.15. See Andrews 2014, p. 304, Sime & French 2015, p. 1124 ff, and, in the context of collective redress, Sorabji, Napier & Musgrove 2008, p. 157 and 178, and the UK Government Response (Ministry of Justice), *Improving Access to Justice through Collective Actions*, July 2009, p. 15.

<sup>198</sup> For a case law overview, see O'Hare & Browne 2015, no. 26-002.

<sup>199</sup> Sime & French 2015, p. 1131-1132, referring to *Porzelack v. Porzelack* [1987] 1 W.L.R. 420 (Ch).

<sup>200</sup> See, for instance, *Pittville v. Hunters & Frankau* [2016] 6 Costs L.R. 1059 (Ch), para. 10 (referring to an earlier decision of the procedural judge).

<sup>201</sup> See, for instance, *Michael Phillips Architects v. Riklin* [2010] EWHC 834 (QB) and *RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch), para. 81 ff.

<sup>202</sup> CPR 25.14.

<sup>203</sup> *RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch), para. 19 ff.

<sup>204</sup> *Hamilton v. Al Fayed (No. 2)* [2002] EWCA Civ 665 (CA). See section 5.3.6.2.

<sup>205</sup> See section 5.3.6.2.

<sup>206</sup> CPR 25.14. See, for instance, *Reeves v. Sprecher and Others* [2009] EWHC 3226 (Ch), para. 23, and *RBS Rights Issue Litigation* [2017] EWHC 463 (Ch), paras 21-82.

ECHR).<sup>207</sup> The disclosure of (the terms of) the funding arrangement or ATE policy itself can be ordered if such disclosure would aid the case management or assess the funder's level of control over the course of litigation, but will be rejected if its sole purpose is to enable a defendant in its consideration to apply for security for costs against the funders.<sup>208</sup> This is because the third party is not – yet – party to the proceedings, and there is a potential risk of such information being misused by the defendants and/or the risk of inducing satellite litigation.

The amount of security is as high as the court deems fit in light of the costs that the defendant is likely to incur, and should be neither illusory nor oppressive.<sup>209</sup> Given the high litigation costs in England and Wales, the quantum of security can be substantial. In a shareholder case involving around 50,000 shareholders, the court ordered a security for costs of £ 2.5 million.<sup>210</sup> In the *Excalibur* case (not a mass litigation case), the claimant – or rather, his funders – had to provide security as high as £ 17.5 million.<sup>211</sup> In the *RBS litigation* (GLO), it was set at £ 7.5 million.<sup>212</sup> Yet, such security might only be a fraction of the potential adverse costs risk:

*'any amount now required to be secured is likely to be dwarfed by the amounts ultimately payable if the Defendants are awarded costs at trial, even if those costs are enormously discounted.'*<sup>213</sup>

Based on the experiences of Canada and Australia with security for costs in class actions, Mulheron has argued that its potential to hinder access to justice in mass litigation should not be underestimated. She states that there is no empirical evidence that impecunious claimants have been put forward in order to avoid an adverse costs order or security for costs.<sup>214</sup> Nevertheless, following the CJC's recommendations, the provisions on security for costs apply in multi-party litigation.<sup>215</sup> A defendant in (collective) proceedings before the CAT can also seek security for costs; the rules are similar to the aforementioned rules.<sup>216</sup>

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<sup>207</sup> *Wall v. Royal Bank of Scotland* [2016] EWHC 2460 (Comm), para. 27 ff.

<sup>208</sup> See, for instance, *Reeves v. Sprecher and Others* [2009] EWHC 3226 (Ch), para. 23, *Flatman v. Germany* [2013] EWCA Civ 278, para. 48 ff, and *RBS Rights Issue Litigation* [2017] EWHC 463 (Ch), paras 119-126. See also section 5.4.5.

<sup>209</sup> See *Hurst* 2013, p. 523-524, and *Sime & French* 2015, p. 1136, referring to *Hart v. Larchpark* [2007] B.C.C. 541 (QB).

<sup>210</sup> *Weir v. Secretary of State for Transport* [2005] EWHC 812 (Ch).

<sup>211</sup> *Excalibur v. Texas & Ors* [2013] EWHC 4278 (QB).

<sup>212</sup> *RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch), para. 142.

<sup>213</sup> *RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch), para. 133. The estimated costs on the defendant's side at the time of the application for security was approximately £ 129 million – although they might have been disproportionate and/or 'seriously inflated'. See section 5.3.6.2.

<sup>214</sup> Mulheron 2009a, p. 221.

<sup>215</sup> See Sorabji, Napier & Musgrove 2008, recommendations 4 and 9, p. 157 and 178-179, and the UK Government Response (Ministry of Justice), *Improving Access to Justice through Collective Actions*, July 2009, p. 15.

<sup>216</sup> Competition Appeal Tribunal Rules 2015, section 59 in conjunction with section 74.



### 5.3.4 Costs shifting

#### 5.3.4.1 The loser pays rule

In England and Wales, generally, the loser pays or the ‘costs follow the event’ rule applies.<sup>217</sup> The underlying principle is fairness or justice: an adverse costs order restores the prevailing party to its original position. Moreover, the risk of an adverse costs order might avoid abusive litigation and encourage parties to settle.<sup>218</sup> The order should not be considered as punishment for the losing party, nor a bonus to the prevailing one.<sup>219</sup> This is also known as the indemnity principle: the losing party might be ordered to pay the prevailing party’s costs, but never more than the actual costs that the prevailing party owes to his solicitor.<sup>220</sup>

The general approach towards the loser pays rule used to be that the prevailing party was fully indemnified. According to Lord Woolf, this approach has encouraged litigants to increase litigation costs:

*‘If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so.’*<sup>221</sup>

Jackson has described the functioning of the loser pays rule in England and Wales as ‘a recipe for runaway costs’ and uncertainty.<sup>222</sup> Both the Woolf and Jackson reforms therefore aimed at encouraging reasonable litigation practice and costs. The main element that still shapes the effect of the rule is the court’s discretionary power as to whether costs are shifted from the prevailing to the losing party, and if so, which costs and what amount.<sup>223</sup> Nowadays, this does not necessarily lead to full indemnification, but mostly results in partial indemnification.<sup>224</sup> At a rough estimate, on a standard basis the prevailing party recovers about 75% of its lawyers’ fees.<sup>225</sup> Since the Woolf reforms, courts can make separate orders regarding different issues, in order to incentivize parties to be more selective in their legal position.<sup>226</sup> However, the rules’ complexity and courts’ discretionary powers have increased uncertainty and satellite litigation:

*‘Today the fear of costs is no longer confined to litigants of modest means. It affects even the rich and preoccupies even mighty Government departments. The complexity of the costs rules combines with the extensive court discretion whether to order a party to pay costs and how much to pay. The*

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<sup>217</sup> CPR 44.2(2).

<sup>218</sup> Zuckerman 2013, p. 1325-1327, Andrews 2013, p. 526.

<sup>219</sup> *Harold v. Smith* [1860] 5 Hurlstone and Norman 381 (Court of Exchequer), p. 385.

<sup>220</sup> Solicitors Act 1974, section 60(3).

<sup>221</sup> *AEI Rediffusion Music v. Phonographic Performance* [1999] 1 W.L.R. 1507, p. 1523.

<sup>222</sup> Jackson 2017, p. 11.

<sup>223</sup> CPR 44.3(1). See also the Senior Courts Act 1981, section 51(1).

<sup>224</sup> Reimann 2012, p. 13.

<sup>225</sup> Peysner 2010, p. 296. See, similarly, *Colour Quest and others v. Total Downstream and others* [2009] EWHC 823 (Comm), para. 3. On the difference between standard and indemnity basis, see section 5.3.4.3.

<sup>226</sup> Jackson 2009, p. 22 ff.

*exercise of this discretion has proved fertile ground for disputes, which could turn to be as extensive and costly as the resolution of the substantive action.*<sup>227</sup>

As discussed in section 5.3.2, in past years, a number of Jackson's recommendations have been implemented to further control litigation costs at the outset or during litigation. The effect of costs management or capping on the adverse costs order at the end of litigation will also be discussed hereafter. If parties have settled a case out of court and have agreed that one pays the other's reasonable costs, yet cannot agree on the amount thereof, either one can apply for costs-only proceedings.<sup>228</sup> The court will then assess the costs, generally through a detailed assessment,<sup>229</sup> pursuant to the regular relevant rules.

#### **5.3.4.2 Does the loser indeed pay?**

Generally, as a first step in a costs order, the court will determine whether or not the prevailing party's costs should be shifted. The general rule is that the unsuccessful party pays the successful one's costs. The court may make a different order, however.<sup>230</sup> The order can be based on separate issues instead of the overall outcome of the case.<sup>231</sup> In its determination, the court needs to consider all the circumstances.<sup>232</sup> An important factor is the parties' conduct. For instance, the court might address the question of whether it was reasonable for a party to raise or pursue an issue.<sup>233</sup> Zuckerman has argued that the motive for bringing the action can (and should) be addressed otherwise (e.g. striking out the claim), because as part of the costs order it gives rise to satellite litigation on questions of blame. Moreover, it changes the purpose of the 'morally neutral' loser pays rule to a blame-based principle through which unjustifiable loss is compensated and the litigant is compared to a tortfeasor.<sup>234</sup> 'There is plainly nothing unlawful, improper, or even undesirable in seeking court adjudication.'<sup>235</sup> Either way, to depart from the loser pays rule requires substantial justification.<sup>236</sup>

There are a number of statutory exceptions to the loser pays rule. For instance, costs shifting does not apply in family proceedings.<sup>237</sup> Furthermore, since 2013, qualified one-way costs shifting (QOCS) applies in personal injury claims for damages.<sup>238</sup> In general, with QOCS, an adverse costs order against an unsuccessful claimant cannot be enforced without the permission of the court.<sup>239</sup> The rule was

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<sup>227</sup> Zuckerman 2013, p. 1307. See also Jackson 2013, p. 1322, and similarly Jackson 2009, p. 27.

<sup>228</sup> CPR 46.14 and PD 46, paras 9.1-9.12.

<sup>229</sup> PD 46, para. 9.9. On the types of assessment, see section 5.3.4.3.

<sup>230</sup> CPR 44.2(2)(b).

<sup>231</sup> CPR 44.2 (6) and (7). See, for instance, *Sharp and others v. Blank* [2016] EWHC 776.

<sup>232</sup> CPR 44.2(4).

<sup>233</sup> CPR 44.2(5)(b). See, for instance, *Three Rivers District Council and others v. Bank of England* [2006] EWHC 816 (Comm).

<sup>234</sup> Zuckerman 2013, p. 1325.

<sup>235</sup> Zuckerman 2013, p. 1326.

<sup>236</sup> Zuckerman 2013, p. 1330, referring to *Mendes v. Southwark London* [2009] EWCA Civ 594.

<sup>237</sup> CPR 44.2(3).

<sup>238</sup> CPR 44.13 ff.

<sup>239</sup> That is, if the amount of the costs order exceeds any awarded damages; for instance, if the claimant is partly successful. On the exact effect of QOCS see, for instance, *Sime & French* 2015, p. 1182 ff. and Zuckerman 2013, p. 1376 ff.

introduced as an alternative to ATE insurance and to mitigate the effect of abolishing the recoverability of the premium thereof.<sup>240</sup> QOCS addresses the asymmetric relationship between the parties – the uninsured or otherwise poorly resourced claimant versus the defendant with deep pockets – and aims to provide costs protection for injured parties and therewith ensure access to justice.<sup>241</sup> As the court takes into account a claimant's litigation conduct, the rule is said not to affect the risk of frivolous litigation.<sup>242</sup> The rule does not include a financial means test – thus, funded claimants also fall within the scope of QOCS.<sup>243</sup>

In 2016, the CJC issued a report, upon Jackson's recommendation to further consider which categories of litigants in other areas of civil litigation should benefit from QOCS.<sup>244</sup> It argues that evidence on the possible effects of QOCS is limited and that, before moving forward, certain risks should be further examined. For instance, in claims arising from negligently-handled injury cases,<sup>245</sup> there is a risk that solicitor premiums will increase and a secondary market for 'claims farming' develops.<sup>246</sup> CJC has concluded that it is a matter of policy to further extend QOCS. So far, the government does not seem eager to do so, as CFAs were less common in other areas of civil litigation and imposing QOCS 'would distort the market by imposing substantial changes on all cases in a particular category of proceedings for a small number of claimants'.<sup>247</sup> Jackson has recommended that if the scope of QOCS is to be expanded, courts should be able to test claimants' financial resources, in order to recognize the fact that an asymmetry between parties does not exist in all civil matters.<sup>248</sup>

In multi-party proceedings, the loser pays rule applies as well.<sup>249</sup> Its actual functioning depends on the type of mechanism, and will be discussed in sections 5.3.6 and 5.5.

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<sup>240</sup> The ATE insurance and the recoverability of the premium thereof has a similar effect as QOCS, but was said to contribute to increasing litigation costs and satellite litigation; see section 5.3.5.2.

<sup>241</sup> Jackson 2010, p. 89 and 184. See also UK Government, *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response*, March 2011, p. 11. See also the overriding objective that includes that cases are dealt with proportionately in accordance with the financial position of each party.

<sup>242</sup> Jackson 2010, p. 89. See CPR 44.15 and 44.16(1). See, for instance, *Thompson v. Go North East* [2016] WL 06065938 (CC).

<sup>243</sup> Unless the claimant has taken out a so-called pre-commencement funding agreement: a CFA success fee or ATE insurance entered into before 1 April 2013, because such fees/premiums remain recoverable. See CPR 44.17 in conjunction with 48.2 and, for instance, *Catalano v. Espley-Tyas Development Group* [2017] EWCA Civ 1132. If the claim is made for the financial benefit of another, the court might make a non-party costs order against this other person; CPR 46.2 in conjunction with 44.16(3). This concerns, for instance, subrogated claims and claims for credit hire; see PD 44, para. 12.2.

<sup>244</sup> See Kinley 2016.

<sup>245</sup> Which is one of the areas to which QOCS might be expanded.

<sup>246</sup> Kinley 2016, p. 19.

<sup>247</sup> UK Government, *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response*, March 2011, p. 13. See, similarly, Ministry of Justice, *Legal Aid, Sentencing and Punishment of Offenders Act 2012: Post-Legislative Memorandum*, October 2017, footnote 165.

<sup>248</sup> Jackson 2017, p. 156.

<sup>249</sup> Conform CJC's and Jackson's recommendation; see Sorabji, Napier & Musgrove 2008, p. 173 ff, and Jackson 2010, p. 336 (although in his preliminary report, he considered abolishing the principle in group litigation; see Jackson 2009,

#### 5.3.4.3 How much does the loser pay?

Once the court has decided that it is appropriate to shift costs, the question of which costs should be shifted and what amount will then arise. This requires a costs assessment, which can be undertaken by the court that has dealt with the particular case (summary assessment) or in separate proceedings before a costs officer at the Senior Courts Costs Office (detailed assessment).<sup>250</sup> In complex litigation, such as multi-party litigation, detailed assessment is likely. The assessment of the receiving party's statement of costs is at the court's discretion, but is subject to various CPR provisions and common law principles.<sup>251</sup> Thorough and strict costs assessment has become increasingly important. As the High Court noted in the RBS Litigation (GLO proceedings):

*'litigants are free to pay for a Rolls-Royce service but not to charge it all to the other side.'*<sup>252</sup>

There are two routes along which the costs are assessed: the standard or indemnity basis.<sup>253</sup> The indemnity basis is applied if, in any way, some of the party's conduct is found to be abusive or unreasonable; thus, in the determination of the amount, too, the parties' conduct plays a role.<sup>254</sup> The conduct will give rise to a claim for indemnity costs if it 'takes the case out of the norm'; misconduct 'deserving of moral condemnation' is not a requirement.<sup>255</sup> Either way, the court will only award those costs that have been reasonably incurred and are deemed reasonable as to their amount. For instance, in the Corby litigation (GLO proceedings) the court ruled that the claimants had adopted a 'scattergun approach' to litigation and that some time had been wasted at trial. The claimants' costs entitlement was therefore reduced by 10%.<sup>256</sup> As mentioned in section 5.3.2.2, the Guideline Hourly Rates provide a benchmark for reasonable hourly fees for solicitors and legal executives, and are used by courts to assess the recoverability of the fees.<sup>257</sup> The guidelines have been designed for summary assessment, but are also used for detailed assessment. Furthermore, if the standard cost route is followed, the court will determine whether the costs have been proportionately incurred and are proportionate in their amount. The principle of proportionality was introduced by Lord Woolf and, following Jackson's recommendations, refined in 2013.<sup>258</sup> Costs are proportionately incurred if they bear a reasonable relationship to the sum or value at issue, the complexity and conduct of litigation, and wider factors

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Chapter 38). See also UK Government Response (Ministry of Justice), Improving Access to Justice through Collective Actions, July 2009, p. 15.

<sup>250</sup> CPR 44.6(1) and 44.1(1).

<sup>251</sup> Zuckerman 2013, p. 1312, referring to, inter alia, Aiden Shipping v. Interbulk [1986] 2 WLR 1051 (HL).

<sup>252</sup> RBS Rights Issue Litigation [2017] EWHC 463 (Ch), para. 134.

<sup>253</sup> CPR 44.3 and 44.4.

<sup>254</sup> CPR 44.4(3)(a).

<sup>255</sup> Excelsior Commercial & Industrial Holdings v. Salisbury Hamer Aspden & Johnson [2002] EWCA Civ 879, Colour Quest and others v. Total Downstream and others [2009] EWHC 823 (Comm).

<sup>256</sup> Corby Group Litigation v. Corby District Council [2009] EWHC 2109 (TCC), para. 26 ff.

<sup>257</sup> For barristers' fees, the Senior Costs Office has published figures based on previous case law. This guideline is used as a starting point for assessing such fees. See Sime & French 2015, p. 1224.

<sup>258</sup> Proportionality was added to the overriding objective in CPR 1.1, and defined and refined in CPR Part 44. See Jackson 2009, p. 25-26, Jackson 2010, Chapter 3, Hurst 2013a, and Cox 2014.

such as reputation or public importance.<sup>259</sup> In its consideration of proportionality, the court can first compare the overall costs to the overall amount at issue, and spending more than 25% could 'ring alarm bells'.<sup>260</sup> Costs can be necessary and reasonable, but that does not render them proportionate. If the costs are disproportionate in their amount, they might be reduced or disallowed.<sup>261</sup> In a complex case, the court should approach proportionality in the same way as in an individual claim.<sup>262</sup>

A costs order on an indemnity basis usually leads to a greater costs award than one under the standard basis.<sup>263</sup> Within the context of entrepreneurial litigation, the *Excalibur* case is an important example of a costs order under the indemnity basis.<sup>264</sup> The court ordered that the nine funders involved had supported a hopeless case that was 'essentially speculative and opportunistic'. The claimant, aided by its funders, had pursued 'spurious claims' 'replete with defects, illogicalities and inherent improbabilities', 'relentlessly to the bitter end'. Thus, the claimant was ordered to pay adverse costs, estimated at a minimum of £25 million.<sup>265</sup> Such an order should not be considered as punishment for the unsuccessful litigant:

*'It is to afford the successful party a more generous criterion for assessing which of his actual costs should be paid by his opponent because of the way in which the latter, or those in his camp [such as litigation funders], have acted.'*<sup>266</sup>

The court will calculate costs on an issue by issue basis, but if such a calculation is too complex, the court can also award the prevailing party a percentage of the costs that it has incurred.<sup>267</sup>

A costs budgeting or capping order usually avoids detailed costs assessment.<sup>268</sup> A court will generally follow a previous costs budgeting or capping order.<sup>269</sup> If the costs have been capped, the court will still assess the costs, and the order will address the costs actually incurred up to the limit of the cap.<sup>270</sup>

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<sup>259</sup> CPR 44.3(5). For a case in which public importance and reputational issues might have played a role in the extraordinarily high costs on the defendant's side, see *RBS Rights Issue Litigation* [2017] EWHC 463 (Ch), para. 138.

<sup>260</sup> *Sharp v. Blank* [2017] EWHC 141, para. 3 ff., with further references.

<sup>261</sup> CPR 44.3(2); see also *PD 44*, paras 6.2 and 9.10. This reverses the link between 'necessity' and 'proportionality', as had been introduced in *Lownds v. Home Office* [2002] 1 WLR 2450 (CA).

<sup>262</sup> *Motto and Others v. Trafigura & Trafigura Beheer* [2011] EWCA Civ 1150 (CA), para. 50.

<sup>263</sup> *Jackson* 2009, p. 26, with further references to case law.

<sup>264</sup> *Excalibur v. Texas Keystone and Others* [2013] EWHC 4278 (QB).

<sup>265</sup> The extent to which the nine funders were liable for these costs will be discussed in section 5.3.6.

<sup>266</sup> *Excalibur v. Texas Keystone and Others* [2014] EWHC 3436 (QB), consideration 60.

<sup>267</sup> *Burchell v. Bullard* [2005] EWCA Civ 358 (CA), para. 29 ff. See also *Jackson* 2009, p. 23-24 and *Zuckerman* 2013, p. 1313, both with further references.

<sup>268</sup> *Jackson* 2017, p. 91.

<sup>269</sup> CPR 3.18. See also sections 5.3.2.2 and 5.3.2.4.

<sup>270</sup> *Jackson* 2017, p. 96.

### 5.3.5 Recovery of litigation funding costs

#### 5.3.5.1 Introduction

The types of litigation funding that will be discussed in section 5.4 include conditional fee arrangements (CFAs), which might entail a success fee, and damages-based agreements (DBAs) and litigation funding agreements (LFAs), which entail a contingency fee. Whether the costs of litigation funding, such as the success or contingency fee, can be obtained from a defendant in the case of success depends on the type of litigation funding.

#### 5.3.5.2 CFA success fee

As of 2000, defendants could be held liable for the CFA success fee of successful claimants. The operation of CFAs will be further discussed in section 5.4.3.1, but generally, a CFA success fee is a percentage increase of a solicitor's or barrister's base fee. This increase, the success fee, is only payable upon a successful outcome. The recoverability of a success fee – and that of an ATE insurance premium – was abolished in 2013.<sup>271</sup> Hence, gradually, the complex assessment of recoverability and, thus, the reasonableness of success fees will fade into the ghost of the past. I will address the topic nevertheless, given the lessons learned on its impact on litigation costs and, thus, its relevance for entrepreneurial mass litigation.

Courts could order a losing defendant to reimburse the claimant's success fee as an 'additional liability'.<sup>272</sup> The courts of first instance and appeal were supposed to act as watchdogs by assessing such liability as part of the (detailed or summary) costs assessment. This included the level of the success fee. In so doing, the court would consider the facts and circumstances as they reasonably appeared to the solicitor or counsel at the time when the funding arrangement was entered into, and at the time of any variation of the arrangement.<sup>273</sup> Hindsight assessment was not allowed. Relevant factors for the reasonableness of the success fee included the availability of other funding methods, whether the success fee reflected the case's prospect of success, and whether it was fixed or reviewable as the case (and the prospect of success) would progress.<sup>274</sup> Despite the overriding objective, which includes that cases are dealt with in ways which are proportionate to the financial position of each party, a claimant's financial position was irrelevant; any person could conclude a CFA.<sup>275</sup> As the defendant was potentially liable for these additional costs, claimants were obliged to disclose information about the CFA and ATE, that is, whether such arrangements had been entered into. The amount of the additional

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<sup>271</sup> LASPO 2012, section 44(4), amends CLSA 1990, section 58A(6), and LASPO, section 46(1), inserts CLSA 1990, section 58C. See also Jackson 2010, Chapter 10, and UK Government, *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response*, March 2011, p. 6.

<sup>272</sup> See CPR 43.2, 44.3A and 44.3B, and the Costs PD (old). Pursuant to the former CLSA, section 58A(7) and the relevant rules of court, the court assessed, inter alia, a success fee. The requirements for the contents of an agreement were laid down in the Conditional Fee Agreements Regulations 2000, sections 2 and 3, and the Conditional Fee Agreements Order 2000, section 4.

<sup>273</sup> Costs PD, para. 11.7 (old).

<sup>274</sup> Costs PD, para. 11.8 (old). See, for instance, *Callery v. Gray* (No. 1) [2001] EWCA Civ 1117; *Atack v. Lee* [2004] EWCA Civ 1712; and *U v. Liverpool City Council* [2005] EWCA Civ 475. See also the *Trafigura* case, as discussed hereafter.

<sup>275</sup> *Campbell v. MGN* [2005] UKHL 61, at 11 and 25 ff.

liability or method of calculation (such as the success fee percentage) did not have to be disclosed until costs assessment at the end of litigation.<sup>276</sup>

The Lord Chancellor originally proposed a maximum success fee of 10 or 20%, but the uplift was later statutorily capped at 100% of the base costs.<sup>277</sup> This maximum uplift was not meant to be the standard. As Chief Master Hurst reflected in 2003:

*'[i]t is generally accepted that if the chances of success are no better than 50% the success fee should be 100%. The thinking behind this is that if a solicitor were to take two identical cases with a 50% chance of success in each it is likely that one would be lost and the other won. Accordingly the success fee (of 100%) in the winning case would enable the solicitor to bear the loss of running the other case and losing.'*<sup>278</sup>

In the early stages of CFAs, courts did not lay down hard and fast rules on what could be considered reasonable percentages. In personal injury claims resulting from traffic accidents, in 2001, the Court of Appeal ruled that in modest and straightforward claims, a maximum uplift of 20% could be considered reasonable, unless persuaded otherwise. It also ruled that the courts should continue to monitor success fees as the practice of CFAs (and ATE) was still developing.<sup>279</sup> The Court of Appeal also drew attention to the (preferred) alternative structure of a two-step success fee. Hereby, the agreed uplift (with a maximum of 100%) would be reduced if the case was settled before a specific moment in the proceedings, for instance, to an uplift of 5%. According to the Court of Appeal, such a construction had the advantages that a refusal to settle would indicate a serious defence, the knowledge that the full uplift would be payable would encourage early settlement and a rigorous consideration of the merits, and the fee reflected the risk of the individual case, also the one that even a simple claim might be contested.<sup>280</sup> This construction, with a maximum reduced uplift of 5%, was later deemed apt 'to cater for the wholly unexpected risk lurking below the limpid waters of the simplest of claims', that is, 'extremely simple' claims where 'the prospects of success are virtually 100%'.<sup>281</sup>

Within the context of entrepreneurial mass litigation, the *Trafigura* case is an illustrative example of the level of potential additional liability for defendants and the court's assessment thereof.<sup>282</sup> In 2009, this group action (GLO) for the personal injury of almost 30,000 claimants resulted in a settlement. The court approved the terms of the settlement agreement, which allowed for £ 30 million in damages

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<sup>276</sup> CPR 44.15 and Costs PD, paras 19.1, 19.4 and 6.2(2) (old).

<sup>277</sup> The Conditional Fee Agreements Order 2013, section 3 (previously: Conditional Fee Agreements Order 2000, section 4) specifies the cap as mentioned in CLSA 1990, section 58(4)(c). For a historical overview of CFAs and ATEs see, for instance, *Callery v. Gray* (No. 1) [2001] EWCA Civ 1117 and Hurst 2013, p. 257 ff.

<sup>278</sup> *Designers Guild v. Russell Williams* [2003] 2 Costs L.R. 204 (HL), at 14.

<sup>279</sup> *Callery v. Gray* (No. 1) [2001] EWCA Civ 1117, at 102-105. See also *Callery v. Gray* (Nos 1 & 2) [2002] WL 1310759 (HL).

<sup>280</sup> *Callery v. Gray* (No. 1) [2001] EWCA Civ 1117, at 108-109.

<sup>281</sup> *Claims Direct Test Cases* [2003] EWCA Civ 136, para. 100-101.

<sup>282</sup> See also sections 1.1.1 and 5.3.5.5.

and for Trafigura to pay the claimants' litigation costs. However, after the claimants' law firm submitted its bill of approximately £ 105 million, Trafigura decided to challenge those costs and bring the bill before a costs judge for detailed assessment. A substantial part of the bill was made up of the success fee of 100% under which the claimants' solicitors and counsel had acted (combined with an ATE insurance). Ultimately, on appeal, the court upheld the costs judge's ruling to cut the success fee to 58%, which represents about a 62% chance of success.<sup>283</sup> An important factor was the claim's prospect of success. According to the Court of Appeal, a costs judge should rely upon the claimant's initial assessment thereof, but should be critical of the applied method and recognize that such assessment is 'at least potentially self-serving'.<sup>284</sup> Hence, where possible, a costs judge should also consider other evidence, such as the assessment of the ATE insurer. Moreover, it should consider any change of circumstances – potentially altering the prospects of success – after the initial assessment. Ultimately, according to the Court of Appeal, a costs judge's assessment of an appropriate success fee involved 'an overall assessment by weighing up various factors which were inherently difficult to quantify and on which reasonable people could differ (sometimes quite substantially)'.<sup>285</sup>

The complexity and consequences of the courts' task of assessing reasonableness was described by Lord Bingham:

*'If they [the courts] were too restrictive in the level of success fees (...) which they allowed, lawyers and clients might be deterred from acting or proceeding on this basis and the objects of the new regime would be defeated. If they were too generous and too uncritical, excessive fees (...) might be allowed and an unfair and disproportionate burden placed on defendants and their liability insurers, thereby undermining one of the key objects of the Civil Procedure Rules.'*<sup>286</sup>

The Trafigura case also shows the potential for extensive (satellite) litigation. This can be illustrated with the following paragraph from one of the three costs court judgments:

*'The defendants, not surprisingly, have launched an extremely vigorous attack on both the generic and individual bills. I have been given electronic copies of the bills, which I am told run to some 55,000 items, all of which are challenged (...) For the purpose of these key issues I was presented with in excess of 60 ring-binders of documents, and (...) the defendants' skeleton argument, including supporting schedules, ran to over 1,000 pages, this being in addition to a witness statement (...) which, with exhibits, ran to over 3,000 pages. The claimants' skeleton runs to 73 pages, and their supporting witness statements, including exhibits, run to 923 pages.'*<sup>287</sup>

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<sup>283</sup> *Motto and Others v. Trafigura & Trafigura Beheer* [2011] EWCA Civ 1150 (CA), paras 115-134, and *Motto and Others v. Trafigura & Trafigura Beheer* [2011] EWHC 90201 (Costs), paras 398-449. Note that, here, the role of the appellate court differs from that of the costs judge, see the CoA judgment, paras 32 and 133. The recoverability of the ATE premium was allowed as billed, see the CoA judgment, paras 135-144.

<sup>284</sup> *Motto and Others v. Trafigura & Trafigura Beheer* [2011] EWCA Civ 1150 (CA), para. 122.

<sup>285</sup> *Motto and Others v. Trafigura & Trafigura Beheer* [2011] EWCA Civ 1150 (CA), para. 127.

<sup>286</sup> *Callery v. Gray (Nos 1 & 2)* [2002] WL 1310759 (HL), para. 6.

<sup>287</sup> *Motto and Others v. Trafigura & Trafigura Beheer* [2011] EWHC 90201 (Costs), para. 24.



The developing case law and the statutory fixation of success fees and the recovery thereof in specific type of cases created a colourful chaos. The market did not sufficiently develop reasonable fees. For instance, in 2005, the Court of Appeal found that the litigation risk in the case at hand justified a percentage of 15% rather than the 100% uplift the counsel and 70% uplift the solicitor had charged.<sup>288</sup> Furthermore, the establishment of a reasonable fee remained challenging for courts. Lord Hoffmann even stated that (costs) judges were not nor should be in the position to do so:

*'What in fact determines the success fee solicitors charge is what costs judges have been willing to allow in more or less comparable cases, the fee being set at the level regarded as optimistic but hopefully not so optimistic as to provoke the liability insurers into contesting the amount. (...) So the next question is whether a decision of a costs judge, or the Court of Appeal on appeal from a costs judge, is the best way of compensating for the absence of price competition in the market. The traditional function of the costs judge, or taxing master, as he used to be called, was to decide what fees were reasonable by reference to his experience of the general level of fees being charged for comparable work. But this approach only makes sense if the general level of fees is itself directly or indirectly determined by market forces. Otherwise the exercise becomes circular and costs judges will be deciding what is reasonable according to general levels which costs judges themselves have determined. In such circumstances there is no restraint upon a ratchet effect whereby the highest success fees obtainable from a costs judge are relied upon in subsequent assessments. (...) I rather doubt whether difficulty is likely to be removed merely by the passage of time. All that costs judges will learn is what other costs judges are allowing. Solicitors will charge whatever is currently allowed and exert upward pressure to be able to charge more. But that will not tell anyone whether the fees paid to the solicitors represent reasonable value for money. (...) A legislative decision to fix costs at levels calculated to provide adequate access to justice in the most economical way seems to me a more rational approach than to leave the matter to individual costs judges. (...) Not only would this be more likely to keep the actual costs within reasonable levels but it would also greatly reduce the cost of disputes over costs. We were told that no less than 150,000 cases awaited the outcome of your Lordships' decision in this case.'*<sup>289</sup>

Hence, the recoverability of success fees (and ATE premiums) had not only positively influenced access to justice, but also contributed to increasing litigation costs and helped incite the so-called costs war. The costs war covered various (technical) legal issues regarding CFAs, but in essence, the problem was made up of the following elements.<sup>290</sup> Claimants had no incentive to negotiate the percentage of the success fee or the price of the ATE premium since they would not have to pay them. Lawyers had an incentive to negotiate a high percentage and to 'cherry pick', and therewith substantially enlarge their earnings. Thus, the market did not function. Defendants had all the incentives in the world to contest the percentage charged, in order to lower their liability, thereby creating extensive satellite litigation.

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<sup>288</sup> Begum v. Clarit [2005] EWCA Civ 210.

<sup>289</sup> Callery v. Gray (Nos 1 & 2) [2002] WL 1310759 (HL), paras 26, 32, 34 and 36.

<sup>290</sup> For a detailed description of the various elements and causes of the costs war, see Jackson 2009, Chapter 3, Jackson 2010, p. 109 ff, Peysner 2014, p. 93-105, and Jackson 2016a, p. 43-45. See also, for instance, Motto and Others v. Trafigura & Trafigura Beheer [2011] EWCA Civ 1150 (CA), para. 122, Campbell v. MGN [2005] UKHL 61, at 15-17, and Callery v. Gray (Nos 1 & 2) [2002] WL 1310759 (HL), at 5. On the indemnity principle as a cause for satellite litigation, see also section 5.3.5.3.

Furthermore, as a claimant's reason to engage in a CFA could be a lack of resources and taking out an ATE insurance was not mandatory, successful defendants were exposed to the risk of not being able to recover an adverse costs order. Also, the claimants were not under a duty to disclose the percentage of the success fee in their costs estimate, so as not to reveal the funder/insurer's prospect of the merits of the case. Thus, there was no signalling effect to the defendant as to the possible costs risk. This all rendered defendants' position 'wholly unenviable'.<sup>291</sup> The costs war substantially increased lawyers' and litigation costs, and where possible, costs were – indirectly – passed on to the wider public, for instance, by increasing insurance premiums. Courts complained about the level of satellite litigation and the lack of information and/or knowledge to adequately assess and control success fees. They furthermore found it difficult to retrospectively assess a percentage, with hindsight knowledge that could not be used.

Meanwhile, in 2011, the European Court of Human Rights ruled that the – impact of the – recoverability of a success fee (95% uplift) in a media publication case (defamation) had violated the defendant's freedom of expression.<sup>292</sup> In the case at hand, a newspaper had been ordered to pay damages (£ 3,500) and litigation costs (billed for a little over £ 1 million). CFAs and their recoverability had been long said to have a 'chilling effect' on journalism and to hold the risk of inciting defendants to pay (something) in order to avoid high litigation costs.<sup>293</sup> Yet again, the costs and funding debate took place on fertile ground and exerted pressure on the government and the courts.

The dilemma of continuing the recoverability of CFAs was sharply worded by Lord Jackson:

*'It is, of course, congenial for claimant lawyers to see their clients provided with comprehensive funding and insulated from all risk of adverse costs. It is congenial for both claimant and defendant lawyers to have a constant stream of work passing across their desks. Indeed, it is congenial for judges to know that the claimants who appear before them are not putting their personal assets at risk, whatever the outcome of the individual case. But these undoubted benefits have been achieved at massive cost, especially in cases which are fully contested. That cost is borne by taxpayers, council tax payers, insurance premium payers and by those defendants who have the misfortune to be neither insured nor a large and well-resourced organisation.'*<sup>294</sup>

Ultimately, in April 2013 and pursuant to Jackson's recommendation, the LASPO abolished the recoverability of the CFA success fee and ATE premium.<sup>295</sup> Claimants now pay the success fee, the base costs remain recoverable in case of success – as was the situation between 1995 and 2000. In this way, CFA

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<sup>291</sup> Cf. *Turcu v. News Group Newspapers* [2005] EWHC 799 (QB), para. 6.

<sup>292</sup> ECHR 18 January 2011, 39401/04 (*MGN v. United Kingdom*). In 2005, the House of Lords had ruled otherwise; see *Campbell v. MGN* [2005] UKHL 61.

<sup>293</sup> *King v. Telegraph Group* [2004] EWCA Civ 613, paras 37-41 and 99.

<sup>294</sup> Jackson 2010, p. 96.

<sup>295</sup> LASPO 2012, section 44(4), amends CLSA 1990, section 58A(6), and LASPO, section 46(1), inserts CLSA 1990, section 58C.

claimants have an incentive to control the costs incurred on their behalf.<sup>296</sup> As a consequence, the discussion on a reasonable percentage will now, normally, take place outside of court. The government relies upon the market to set more reasonable fees and premiums. The types of cases for which fixed percentages had been statutorily set, now fall under the fixed recoverable costs regime.

As the LASPO also included further legal aid cuts, it was feared that access to justice would take a huge blow. The government therefore took some additional measures. To meet the largest group of CFA users, personal injury victims, the government supported Jackson's recommendation for courts to increase non-pecuniary damages by 10%,<sup>297</sup> it capped success fees at 25% of non-pecuniary damages (other than those for future care and loss), and introduced qualified one way costs shifting (QOCS), so that, generally, personal injury claimants would not need to take out ATE insurance.<sup>298</sup> For mesothelioma proceedings, success fees and ATE premiums remain recoverable until further notice.<sup>299</sup> Furthermore, for all civil cases, the government has lifted the restrictions on damages-based agreements (DBAs), which will be discussed in section 5.4.3.2, and – briefly – hereafter.<sup>300</sup>

### 5.3.5.3 DBA contingency fee

As of 2013, legal representatives such as solicitors are allowed to enter into a damages-based agreement (DBA) in civil litigation. Such agreement includes a fee that is contingent upon success and is determined as a percentage of the proceeds.<sup>301</sup> A contingency fee thus differs from a conditional/success fee, as it is based on the proceeds rather than the solicitor's hourly fee.

Generally, contingency fees pursuant to a DBA do not affect defendants' liability for adverse costs, that is, not negatively. The assessment of recoverable costs (the lawyer's hourly fee and disbursements) takes place in the conventional way, as it would without a DBA.<sup>302</sup> A DBA might, however, *positively* affect defendants. Pursuant to the indemnity principle, courts may not order the losing defendant to pay a claimant any costs that exceed the latter's actual legal liability to his solicitor for costs.<sup>303</sup> In 2010, Jackson recommended abolishing the indemnity principle as it had been the root cause of extensive and expensive satellite litigation:

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<sup>296</sup> UK Government, *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response*, March 2011, p. 6.

<sup>297</sup> See also UK Government, *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response*, March 2011. In 2012, the Court of Appeal first applied the 10% uplift of a non-pecuniary damages award in *Simmons v. Castle* [2012] EWCA Civ 1039. The uplift is not discretionary; see *Summers v. Bundy* [2016] EWCA Civ 126.

<sup>298</sup> LASPO 2012, section 44(2), Conditional Fee Agreements Order 2013, and CPR 44.13 ff.

<sup>299</sup> LASPO 2012, section 48.

<sup>300</sup> LASPO 2012, section 45.

<sup>301</sup> The operation of DBAs will be further discussed in section 5.4.

<sup>302</sup> CPR 44.18. See also Jackson 2010, p. 131-133, and UK Government, *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response*, March 2011, § 13.

<sup>303</sup> Solicitors Act 1974, section 60(3) and CPR 44.18(2). See Zuckerman 2013, p. 1319 and 1323-1324, Mulheron 2014a, p. 110-111, and the Explanatory Memorandum to the Damages-based Agreements Regulation 2013 (draft), para. 7.11;

*Given the ingenuity of lawyers, so long as the indemnity principle is there to tempt them, such unedifying battles are likely to continue into the future.*<sup>304</sup>

Nevertheless, it continues to be in force. Hence, the defendant's liability for adverse costs is capped at the percentage of the contingency fee.<sup>305</sup> If the prevailing claimant's solicitor has incurred more costs than the contingency fee represents, he will not be able to recover it, neither from the defendant nor from the claimant.<sup>306</sup> For instance, if the agreed contingency fee is 25%, the awarded damages are £ 100,000 and the claimant's solicitor fees are £ 30,000, the maximum recoverable costs are £ 25,000. In this case, the claimant receives the full damages award and the defendant pays the claimant's solicitor a maximum of £ 25,000.

#### **5.3.5.4 LFA contingency fee**

Claimants can also enter into a litigation funding agreement (LFA) with a third-party litigation funder. Such an agreement can also include a fee that is contingent upon success and determined as a percentage of the proceeds.<sup>307</sup> Generally, such contingency fee does not affect defendants' liability for adverse costs as it is not recoverable as an additional liability.<sup>308</sup> The assessment of recoverable adverse costs takes place in the conventional way, as it would without an LFA.

It has been argued that the DBA regime does not apply to third-party litigation funding.<sup>309</sup> Hence, no statutory cap applies to LFA contingency fees that would potentially limit defendants' liability. That does not mean that the defendant is necessarily liable for the (full) LFA contingency fee. On the contrary, absent statutory provision, a payment due to the litigation funder is not at all recoverable from a defendant.<sup>310</sup> Generally, as a rule, the costs of funding litigation, such as interest paid on money borrowed to pay solicitors' bills, are not recoverable.<sup>311</sup> Thus, a successful claimant will be able to recover its 'regular' litigation costs from a defendant. It is a matter of contract or law (see hereafter) how the funder recovers his contingency fee, whether and to what extent the recovered costs are distributed between funder, solicitor and claimant(s), and the relation between the recoverable costs and the percentage of the proceeds.

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available at <[legislation.gov.uk/ukdsi/2013/9780111533444/pdfs/ukdsiem\\_9780111533444\\_en.pdf](http://legislation.gov.uk/ukdsi/2013/9780111533444/pdfs/ukdsiem_9780111533444_en.pdf)>. See also section 5.3.4.1.

<sup>304</sup> Jackson 2010, p. 57; see also Jackson 2009, p. 18 ff.

<sup>305</sup> The DBA Regulations cap the (maximum) percentage that a solicitor can charge; DBA Regulations 2013, sections 4(2)(b), 7 and 4(3). See section 5.4.3.2.

<sup>306</sup> Expenses such as expert reports or court charges are excluded from the contingency fee cap; DBA Regulations 2013, section 4(1) in conjunction with section 1(2). See also Mulheron 2014a, p. 111.

<sup>307</sup> The operation of LFAs will be further discussed in section 5.4.

<sup>308</sup> Jackson 2010, p. 117; Hodges Peysner Nurse 2012, p. 93, Mulheron 2015, p. 313.

<sup>309</sup> Mulheron e.a. 2015, p. 33, referring to the drafted DBA Regulations 2015, section 1(2); Mulheron 2014, p. 592 ff. See also section 5.4.3.2.

<sup>310</sup> Similar to the previous recoverability of a CFA success fee, the CLSA – section 58B (8) and (9) – allows for the payment of any amount payable under a litigation funding agreement as part of the costs order, subject to rules of court and the court's assessment. However, this provision of the CLSA is not in force.

<sup>311</sup> See *Hunt v. Douglas (Roofing)* [1987] WL 492269, *Merricks v. Mastercard* [2017] CAT 16, paras 113-114.

In 2016, the High Court upheld an ICC arbitrator's decision that litigation funding costs were subject to recovery as part of the costs of arbitration.<sup>312</sup> The claimant owed the funder either 300% of the advanced funding amount or 35% of the proceeds – whichever was the higher amount – and successfully sought to recover these costs, almost £ 2 million, from the defendant. The total costs order was £ 4 million, based on the indemnity basis, as the defendant's conduct had been financially 'crippling', driving the claimant to expensive litigation.<sup>313</sup> According to the arbitrator, the defendant had left the claimant with no alternative than to turn to a litigation funder. This conduct led the arbitrator to conclude that it would be reasonable to include the costs of litigation funding in the costs order. The High Court confirmed the decision, since pursuant to the relevant rules an arbitrator has the discretion to determine the recoverable 'legal and other costs'.<sup>314</sup> According to the arbitrator, based on expert evidence, the charged rate and terms were standard ones in the market. It has been argued that the decision might create an incentive for funded claimants to bring a claim before an arbitrator rather than a court.<sup>315</sup> However, as the decision should be seen in light of the defendant's bad litigation conduct and given the long history of English courts and tribunals in using cost sanctions, it has also been argued that under these circumstances, a court might very well follow a similar route in civil proceedings.<sup>316</sup>

In collective proceedings (not: collective settlement), a third-party litigation funder might be able to recover its fee from the unclaimed proceedings as part of 'the costs or expenses incurred by the representative in connection with the proceedings'.<sup>317</sup> Hence, in a way, the fees are recovered from the defendant; not as part of the *inter partes* costs order, but as part of the awarded damages. This construction will be further discussed in sections 5.5.6 and 5.5.7.

### 5.3.5.5 Other costs of litigation funding

Various costs can be incurred in connection with litigation funding. I will address vetting costs, made to evaluate the prospects of success, and the costs of negotiating and drafting the funding arrangement.

A reasonable conditional or contingency fee requires, *inter alia*, due diligence to evaluate the prospects of success (vetting). Vetting is an important aspect of mass litigation, as a funder will want to make sure that the investment is solid. The reasonable and proportionate costs of collecting, assessing and managing claims might be recoverable.<sup>318</sup>

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<sup>312</sup> *Essar Oilfields Services v. Norscot Rig Management* [2016] EWHC 2361 (QB).

<sup>313</sup> *Essar Oilfields Services v. Norscot Rig Management* [2016] EWHC 2361 (QB), referring to the ICC arbitrator's judgment.

<sup>314</sup> In civil litigation, the court determines the 'costs of and incidental to the proceedings'; Senior Courts Act, section 51(1). On the different meanings see, for instance, *Merricks v. Mastercard* [2017] CAT 16, para. 109 ff.

<sup>315</sup> V. Connolly, 'Third Party Funding – A new approach to recoverability?', *Stewarts Law*, posted on 18 October 2016; A. Hogan, 'A bridge too far?', *Litigation Funding*, December 2016, issue 106.

<sup>316</sup> S. Friel, 'Unlocking Potential', *Litigation Funding*, April 2017, issue 108.

<sup>317</sup> Competition Act 1998, section 47C(6); see also *Merricks v. Mastercard* [2017] CAT 16.

<sup>318</sup> *Motto and Others v. Trafigura & Trafigura Beheer* [2011] EWCA Civ 1150 (CA), paras 54-64.

As mentioned in section 5.3.5.4., the costs of funding litigation such as the interest paid on money borrowed to pay solicitors bills, are generally not recoverable.<sup>319</sup> In *Motto v. Trafigura*, however, the costs judge ruled (which was upheld on appeal) that the costs of drafting and preparing, explaining and advising on CFAs were recoverable, as they, distinguishable from interest, can be characterised as money payable to solicitors for work done for the ultimate benefit of the client. Moreover, such costs were deemed recoverable as ‘a matter of policy’, the Court of Appeal ruled.<sup>320</sup> However, not all costs of establishing and setting up the CFA can be labelled as such. With regard to expenses for ‘getting business’, such as advertising or advising a potential claimant on the terms and effect of the CFA, ‘the solicitors are acting for themselves (...) [they] are negotiating with him as a prospective client, not for him as an actual client’. Thus, the costs concerned with identifying potential claimants, negotiating the terms on which they are to be engaged, or the costs of discussing the progress of litigation with ATE insurers are not recoverable; they fall under the solicitors’ general overheads or expenses. This all makes the precise dividing line between recoverability and irrecoverability ‘somewhat blurred and subjective’.<sup>321</sup>

### 5.3.6 Liability for adverse costs

#### 5.3.6.1 Liability of class members

In general, a losing party is liable for an adverse costs order. ATE insurance might cover this liability. In mass litigation, it depends on the chosen route whether class members are liable for (their share of) the costs. Determining liability for costs in the various types of mass litigation is a complex exercise.<sup>322</sup>

In a representative action, the normal cost rules apply.<sup>323</sup> In the case of loss, the costs order generally applies to the representative party, not the represented parties.<sup>324</sup> However, the court can make a costs order against non-parties to contribute to the representative’s costs, also in advance.<sup>325</sup> Zuckerman argues that the lack of any reference to cost rules in CPR 19.6 should be construed in such way that, normally, such an order should not be made.<sup>326</sup> Andrews suggests an equitable sharing of the costs burden of representative proceedings to remove the mechanism’s costs impediment. As to the liability for an adverse costs order, such costs sharing could depend on the type of represented parties. A spectrum of represented parties exists, from the ‘unaware’ represented party to the one who in everything but name is the true litigant and, thus, might be ordered to pay or share in the adverse

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<sup>319</sup> See *Hunt v. Douglas* [1987] WL492269.

<sup>320</sup> *Motto and Others v. Trafigura & Trafigura Beheer* [2011] EWCA Civ 1150 (CA), paras 104-106.

<sup>321</sup> *Motto and Others v. Trafigura & Trafigura Beheer* [2011] EWCA Civ 1150 (CA), paras 108-114.

<sup>322</sup> *Hodges* 2009a, p. 110, *Mulheron* 2009a, p. 188, and *Zuckerman* 2013, p. 681.

<sup>323</sup> On the representative action regulation, see sections 2.2.3 and 5.5.2.

<sup>324</sup> See, for instance, *Howells v. Dominion Insurance* [2005] EWHC 552 (QB), para. 37 ff. See also *Sime & French* 2015, p. 285, *Andrews* 2013, p. 626 and 628, *Andrews* 2014a, p. 115, and *Zuckerman* 2013, p. 675.

<sup>325</sup> See CPR 46.2. See also *Aiden Shipping Co v. Interbulk* [1986] 2 W.L.R. 1051, *Bank of America National Trust and Savings Association v. Taylor* [1992] 1 Lloyd’s Rep 484; and *Re British Airways Pension Schemes* [2000] Pens. L.R. 311 (Ch).

<sup>326</sup> *Zuckerman* 2013, p. 675.

costs.<sup>327</sup> In a recent case, the court granted permission to enforce the costs order – also – against the represented parties. It deemed the figures for the costs to be ‘eye-wateringly high’, and in light of the beneficial object of the representative action (avoid unnecessary joinder of parties and enable efficient litigation) it ruled that the costs order could also be enforced against the represented parties.<sup>328</sup>

A different regime applies under the GLO.<sup>329</sup> Within the context of the GLO, group members whose claim have been entered on the register are severally liable – unless the court orders otherwise – for an equal proportion of the common costs, and for the individual costs.<sup>330</sup> *Common* costs are those that have been incurred in relation to the GLO issue(s), the individual costs have been incurred in relation to the test claim, and the lead legal representative’s costs have been incurred in administering the group litigation. *Individual* costs are those that have been incurred in relation to the individual claim entered on the group register. Once a GLO order has been made, the management court may give directions as to how the claimants on the group register will potentially bear or share the costs of resolving common issues or the costs of claims proceeding as test claims.<sup>331</sup>

A combination of the above rules applies in collective proceedings (competition law).<sup>332</sup> The (sub-)class representative is party to the proceedings, against whom a costs order can be awarded.<sup>333</sup> In general, the other represented persons or class members cannot be held liable for adverse costs, unless individual issues have been determined. In such a case, the associated costs can be awarded against the relevant individual person.<sup>334</sup>

### 5.3.6.2 Liability of litigation funders

A legal representative such as the solicitor can be held liable for adverse costs (wasted costs order), but in exceptional circumstances only; the hurdle is very high.<sup>335</sup>

Courts also have a discretionary power to join non-parties in the costs order, such as a litigation funder or a solicitor that acts as such.<sup>336</sup> A costs order against a non-party is exceptional, but not uncommon when an entrepreneurial party is involved. Whether a funder is held liable for the adverse costs first of all depends on the type of funding, that is, whether the funder is considered a ‘pure’ or ‘commercial’ funder. Normally, a pure funder will not be held liable for adverse costs, whereas a commercial funder

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<sup>327</sup> Andrews 2013, p. 629, referring to Australian literature.

<sup>328</sup> Chandra v. Mayor [2016] EWHC 2636 (Ch). See CPR 19.6(4).

<sup>329</sup> On the GLO regulation, see sections 2.2.3 and 5.5.3.

<sup>330</sup> CPR 46.6. See Hurst 2013, p. 46,

<sup>331</sup> PD 19B, para. 12.4.

<sup>332</sup> On the collective proceedings regulation, see sections 2.2.3, 5.5.6 and 5.5.7.

<sup>333</sup> Competition Appeal Tribunal Rules 2015, section 98.

<sup>334</sup> Competition Appeal Tribunal Rules 2015, section 98(1)(b) in conjunction with section 88(2)(c) (for represented persons), and section 98(2) (for class members).

<sup>335</sup> Senior Courts Act 1981, sections 51(6) and 51(7), and CPR 46.8. For instance, if the solicitor has acted negligently, even if he himself has been deceived by a CMC; Trehan v. Liverpool Victoria Insurance and others [2017]. See also Sime & French 2015, p. 1176 ff, Howells 2008, p. 33 and Excalibur v. Texas Keystone and Others [2014] EWHC 3436 (QB), para. 131.

<sup>336</sup> Senior Courts Act 1981, section 51(3). See Sime & French 2015, p. 1174-1175.

might be. A pure funder is one that funds out of affection, ‘whether described as charitable, philanthropic, altruistic or merely sympathetic’, rather than out of a personal, commercial interest.<sup>337</sup> However,

*‘[w]here (...) the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence’<sup>338</sup>*

Although a commercial funder might improve access to justice as a side effect, its mere objective is to make a profit from litigation.<sup>339</sup> Or, as a judge in the Court of Appeal in *Excalibur* put it:

*‘I do not myself think that commercial funders are greatly motivated by the need to promote access to justice, and nor do I suggest that they should be.’<sup>340</sup>*

A commercial funder benefits from the proceedings and – to a certain extent – controls litigation. Thus, ordinarily, a court will make an order for costs against the (non-party) litigation funder if litigation is unsuccessful.

The extent to which a funder can be held liable for adverse costs has been decided in the *Arkin* and *Excalibur* case. In *Arkin*, the Court of Appeal ruled that a litigation funder is liable for the adverse costs to the extent of its funding provided (the so-called *Arkin cap*).<sup>341</sup> This is different, that is, funders will be fully liable if the funding agreement is deemed to be champertous (for instance, if the funders take complete control over the litigation) or if the funders behave dishonestly or improperly.<sup>342</sup> The *Arkin cap* was the court’s solution to balance two competing public policies: the relevance of litigation funding to ensure access to justice versus the costs follow the event principle which entails that a funder that enables litigation should be liable for the costs that defendants incur.<sup>343</sup>

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<sup>337</sup> *Hamilton v. Al Fayed (No. 2)* [2002] EWCA Civ 665 (CA), para. 47; *Sharp and others v. Blank and others* [2017] EWHC 141 (Ch), para. 11.

<sup>338</sup> *Dymocks Franchise Systems v. Todd* [2004] 1 W.L.R. 2807, para. 25. Although a New Zealand case, the headnote (UK Costs Law Reports) states that the case contains a valuable summary of the state of the law as to costs orders against non-parties.

<sup>339</sup> *Hamilton v. Al Fayed (No. 2)* [2002] EWCA Civ 665 (CA).

<sup>340</sup> *Excalibur v. Texas Keystone and Others* [2016] EWCA Civ 1144, para. 28.

<sup>341</sup> *Arkin v. Borchard Lines* [2005] EWCA Civ 655. The limited exposure of funders by way of the *Arkin cap* has been contested, but maintained; *Tinseltown v. Roberts and others* [2012] EWHC 2628 (TCC). See also Rowles-Davies 2014, p. 56 and Jackson 2010, p. 123, who recommends that a litigation funder should be liable for all adverse costs in the case of loss.

<sup>342</sup> *Arkin v. Borchard Lines and Others* [2005] EWCA Civ 655, para. 40, and *Excalibur v. Texas Keystone and Others* [2014] EWHC 3436 (QB), para. 72. On maintenance and champerty, see section 5.4.2.

<sup>343</sup> *Excalibur v. Texas Keystone and Others* [2014] EWHC 3436 (QB), para. 70.



This so-called Arkin cap includes the funding provided to pay for security for costs, as was decided in *Excalibur*. Although it might have been an exceptional case, *Excalibur v. Texas Keystone* contains a landmark ruling for litigation funding in general, and on the liability of funders for adverse costs in particular.<sup>344</sup> The case concerned the entitlement to proceeds of an oil field in Iraq. *Excalibur* was a so-called brass plate company with no real existence or assets. Its claim was funded by seven commercial litigation funders and, in addition, *Excalibur* had entered into a conditional fee agreement with its solicitor. In 2013, the High Court dismissed *Excalibur*'s claim. In its costs judgment, the court did not hold back: *Excalibur* had put forward 'a range of bad, artificial or misconceived claims which required a great deal of expense, labour and time to refute', and the case was 'essentially speculative and opportunistic', 'gargantuan in scope' yet 'based on no sound foundation in fact or law'.<sup>345</sup> For instance, *Excalibur* was found to have grossly exaggerated the quantum of damages, undoubtedly hoping to drive the defendants to settle. The court therefore ordered the defendants' costs to be assessed on the indemnity basis. Subsequently, the court had to decide whether the litigation funders could be held liable for the adverse costs on the indemnity basis, and whether the Arkin cap included funding through providing security for costs. The court first held that all funders had a commercial interest in the outcome of *Excalibur*'s litigation and, thus, could be held liable for the adverse costs as non-parties.<sup>346</sup> The court then ruled that the Arkin cap applied, that there was no champertous agreement nor that the funders themselves had behaved improperly or dishonestly. Then, the court discussed the question of whether the funders should contribute to the costs assessed on the indemnity scale. The court ruled that all funders were liable, jointly and severally, for indemnity costs:

*'The pursuit of objectively hopeless claims which required much time, labour and expense to refute is itself a ground for indemnity costs both against the litigant and his funder. (...) In short, in a case of this kind justice requires that, when the case fails so comprehensively, not merely on the facts but because it was wholly bad in law, the funder should, subject to the Arkin cap, bear the costs ordered to be paid by the person whom or which he has unsuccessfully supported, assessed on the scale which the court thinks it just for that person to pay in the light of all the circumstances, including but not limited to that person's behaviour and that of those whom that person engaged. In short, he should, absent special circumstances, follow the fortunes of those from whom he himself hoped to derive a small fortune. To do otherwise would, in my judgment, be unfair to the Defendants and their personnel, who were on the receiving end of claims and actions of the character that I described in the costs judgment.'*<sup>347</sup>

A potential impact of such an outcome on the litigation funding industry did not impress the court much:

*'I entertain some doubt that my decision will send an unacceptable chill through the litigation funding industry, whose aim is not to finance hopeless cases but those with strong merits. If it serves to cause funders and their advisors to take rigorous steps short of champerty, i.e. behaviour likely to interfere*

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<sup>344</sup> *Excalibur v. Texas Keystone and Others* [2016] EWCA Civ 1144.

<sup>345</sup> *Excalibur v. Texas Keystone and Others* [2013] EWHC 4278 (QB); see, for instance, paras 8, 9, 24, 29 and 31.

<sup>346</sup> *Excalibur v. Texas Keystone and Others* [2014] EWHC 3436 (QB), paras 66-69.

<sup>347</sup> *Excalibur v. Texas Keystone and Others* [2014] EWHC 3436 (QB), paras 97 and 110.

*with the due administration of justice, — particularly in the form of rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate intervals — to reduce the occurrence of the sort of circumstances that caused me to order indemnity costs in this case, that is an advantage and in the public interest.*<sup>348</sup>

Finally, the court ruled that the Arkin cap was to be calculated by reference to the fees paid *and* the money provided for security for costs, as the latter was also to be considered a form of funding, an investment, and therefore to be included.<sup>349</sup>

All this was upheld on appeal. According to the Court of Appeal, it was evident that the case was not one ‘of abstruse legal doctrine upon which two views might be possible’.<sup>350</sup> The conduct of the claimant that gives rise to the indemnity costs includes ‘those in his camp’, whether or not there was a direct contractual relationship. Even if the funders did ‘nothing discreditable in the sense of being morally reprehensible or even improper’, they may be ordered to pay costs on the indemnity basis:

*‘I can see no principled basis upon which the funder can dissociate himself from the conduct of those whom he has enabled to conduct the litigation and upon whom he relies to make a return on his investment.’*<sup>351</sup>

The Court of Appeal was unimpressed by the funders’ assessment of the merits of Excalibur’s claim (at certain points being ‘superficial, feeble and rush’); however, it refused an inquiry into the adequacy of the due diligence as part of the assessment of liability for indemnity costs, as it is ‘at best difficult and unsatisfactory and often impossible’ and would only give rise to undesirable satellite litigation and increasing costs.<sup>352</sup>

Both courts criticised the role of the law firm as well. According to the Court of Appeal, the law firm also took part in the ‘egregious manner in which this litigation was pursued, including, it is surprising and depressing to have to report, aggressive and unacceptable correspondence from Clifford Chance’.<sup>353</sup> The solicitors were not joined in the costs order, but the funders did bring a case to Allen & Overy to pay indemnity costs. Media reports suggest that the case has been settled, with Clifford Chance agreeing to pay the adverse costs.<sup>354</sup>

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<sup>348</sup> Excalibur v. Texas Keystone and Others [2014] EWHC 3436 (QB), para. 129.

<sup>349</sup> Excalibur v. Texas Keystone and Others [2014] EWHC 3436 (QB), paras 133-138.

<sup>350</sup> Excalibur v. Texas Keystone and Others [2016] EWCA Civ 1144, para. 7.

<sup>351</sup> Excalibur v. Texas Keystone and Others [2016] EWCA Civ 1144, para. 24.

<sup>352</sup> Excalibur v. Texas Keystone and Others [2016] EWCA Civ 1144, paras 29 and 30.

<sup>353</sup> Excalibur v. Texas Keystone and Others [2016] EWCA Civ 1144, para. 9.

<sup>354</sup> See, for instance, T. Kinder, ‘Clifford Chance could face another Excalibur bill as CoA makes landmark ruling on indemnity costs’, The Lawyer 18 November 2016; ‘Litigation funders welcome Court of Appeal ruling in Excalibur’, New Law Journal 23 November 2016, available at <newlawjournal.co.uk/content/litigation-funders-welcome-court-appeal-ruling-excalibur>.

The Arkin and Excalibur cases concern individual litigation. As mentioned, costs orders against non-parties are exceptional. However, mass litigation will most likely fall within this category:

*'(...) in my view, a case with multiple claimants seeking to vindicate their rights under a GLO and who have been accorded by Court order the considerable benefit of several and not joint liability for costs will be likely to be considered 'exceptional'. In such a case, the defendant(s) will almost inevitably be put to exceptional difficulty in enforcing any costs order in their favour if they obtain one at the end of the day.'*<sup>355</sup>

Adverse costs can be substantial, in particular in complex litigation such as mass litigation. In the RBS litigation (GLO), after four years of litigation, the overall estimate of costs on the defendant's side was approximately £ 129 million. This might be an unparalleled example and the costs might have been disproportionate and/or 'seriously inflated'; however, such potential liability can create difficulties in obtaining (sufficient) ATE insurance coverage.<sup>356</sup> In order to secure obtaining their potential adverse costs, defendants can also apply for security for costs to be ordered against the litigation funder.<sup>357</sup>

## **5.4 Private litigation funding**

### **5.4.1 Introduction**

As part of the overall retreat from the welfare state and inherent spending cuts, public funding in England and Wales has increasingly reduced in the past few decades.<sup>358</sup> By 1995, statutory limitations on financial eligibility and a strict merits assessment reduced the availability, and low pay rates and bureaucracy deterred attorneys from engaging in legal aid. Nowadays, legal aid remains available to those on a low (disposable) income, but for a limited type of civil legal services only.<sup>359</sup> Conversely, in addition to an expanding market for legal expenses insurance (BTE),<sup>360</sup> the number of available mechanisms for private litigation funding has increased. Currently, the following arrangements are available, which will be discussed in the following sections: a conditional fee arrangement (CFA; possibly combined with an after-the-event insurance, ATE), a damages-based agreement (DBA), third-party litigation funding, and the assignment model. Finally, the initiative to implement a contingency legal aid fund (CLAF) will be briefly discussed.

Essential for the development of private litigation funding in England and Wales are the doctrines of maintenance and champerty. Hence, these doctrines will be discussed first. It is important to note that

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<sup>355</sup> RBS Rights Issue Litigation [2017] EWHC 1217 (Ch), para. 17. See also section 5.3.6.1.

<sup>356</sup> RBS Rights Issue Litigation [2017] EWHC 1217 (Ch), in particular paras 73, 129-131 and 135-136.

<sup>357</sup> Section 5.3.3.

<sup>358</sup> Hodges 2009a, p. 110, Lee & Stech 2011, p. 142, Peysner 2014, p. 3 and 27, Boon 2014, Chapter 3, Sorabji 2014a, p. 4 and Sorabji 2015.

<sup>359</sup> Eligibility criteria are laid down in LASPO 2012, section 8 ff, and the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, and are assessed by the Legal Aid Agency, see <gov.uk/government/organisations/legal-aid-agency>. See also UK Government, *Reform of Legal Aid in England and Wales: the Government Response*, June 2011.

<sup>360</sup> UK Government, *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response*, March 2011, p. 13.

this solely concerns the English and Welsh context. For instance, in Ireland, the doctrine has developed in a different direction.<sup>361</sup>

#### 5.4.2 Maintenance and champerty

The doctrines of maintenance and champerty are a specific feature of common law and are rather unknown to continental jurisdictions. Under the torts of maintenance and champerty, supporting or investing in another person's dispute without just cause used to be prohibited.<sup>362</sup> Maintenance is the 'intermeddling' in the litigation of a third party with no other interest than its own: profiting from another man's claim. Champerty is a species or, according to some, a 'particularly obnoxious form' of maintenance.<sup>363</sup> It refers to the situation in which the third party helps pursue the litigant's claim in exchange for sharing in the proceeds, by way of a 'division of the spoils'.<sup>364</sup>

As of the Middle Ages at least, maintenance and champerty were prohibited as a common law crime/statutory offence as well as a tort. Its existence was always based upon public policy, but different accounts exist on the origin of the ban. Questionable parties would assign fraudulent claims to 'men of power' like noblemen, with the idea that a judge would take such party more seriously and, consequently, the chances of success would increase, or rich landowners would speculate by encouraging actions with a low probability of success to be brought, thereby oppressing legitimate landowners and hoping to share in the occasional successful recovery.<sup>365</sup> Either way, obviously, at one point in time, such risks were relegated to the background, but the fear of abuse such as blackmail and frivolous litigation remained, and so did the doctrines of maintenance and champerty. As a matter of justice and public interest, abusive litigation was to be prevented and, thus, a third party's own interest in litigation was not allowed.

In 1967, criminal and civil liability for maintenance and champerty was abolished. According to the advisory committee, the 'ancient and unused misdemeanours and the ancient and virtually useless torts' could be 'consigned to the museum of legal history'.<sup>366</sup> Nevertheless, section 14(2) of the Criminal Law Act 1967 stated that the abolition would not affect cases in which a contract is regarded as being contrary to public policy or otherwise illegal. Whether a contract was deemed to be contrary to public policy depended on the third party's motive. A genuine motive, a concern for the litigant's right

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<sup>361</sup> See *Persona Digital Telephony v. Minister for Public Enterprise Ireland* [2016] IEHC 187, in which the Irish High Court ruled that litigation funding was not consistent with public policy.

<sup>362</sup> On the evolution of maintenance and champerty, see Chalk 2001, p. 3 ff, Rowles-Davies 2014, p. 22 ff, and *Giles v. Thompson* [1993] 2 W.L.R. 908 (HL), p. 153. See also, for instance, Sime & French 2015, p. 246 ff.

<sup>363</sup> *Trendtex Trading Corp v. Credit Suisse* [1980] QB 629 (CA), p. 654.

<sup>364</sup> *Black's Law Dictionary*, 9<sup>th</sup> edition, 2009; *Giles v. Thompson* [1993] 2 WLR 908 (HL), p. 161.

<sup>365</sup> See Karsten 1998, *Giles v. Thompson* [1993] 2 WLR 908 (HL), p. 153, Hodges, Peysner & Nurse 2012, p. 12 ff, Rowles-Davies 2015, p. 23 ff, Coffee 2015, p. 19.

<sup>366</sup> See the UK Criminal Law Act 1967, sections 13(1), (2) and 14. See also The Law Commission, *Proposals for reform of the law relating to maintenance and champerty*, London, 1966, p. 6.

or a genuine interest in the outcome, was allowed.<sup>367</sup> The motive should not be improper, such as ‘stirring up strife’ or ‘trafficking in litigation’.<sup>368</sup> Courts would declare such contracts void or unenforceable. In essence, two factors underlie this public policy. First, the fear of incentivizing parties to practice unethically in order to secure success, such as inflaming damages or suppressing evidence.<sup>369</sup> Second, the relationship of trust between a solicitor and his client was deemed of such importance that any invitation for the former to act in his own interest rather than that of his client had to be avoided.<sup>370</sup>

After conditional fee agreements were statutorily permitted in 1995,<sup>371</sup> the concept of maintenance and champerty with respect to public policy further developed, in particular in light of the need or desire to enable access to justice. Nowadays, the scope of the rule has progressively narrowed. The modern, flexible approach towards the ancient concepts is whether an agreement undermines ‘the purity of justice’, ‘corrupt public justice’ or ‘the integrity of the litigation process’, which is to be assessed on a case by case basis.<sup>372</sup> Public policy is said to have shifted in favour of, for instance, third-party litigation funding, as shown by recent case law, the endorsement from, inter alia, CJC and Lord Jackson, and the establishment of a regulatory regime for such funding.<sup>373</sup> Nevertheless, maintenance and champerty remain of concern to litigation funders.<sup>374</sup> The remainder of the doctrines in specific funding situations will be further discussed in the following sections.

### **5.4.3 Lawyers’ litigation funding**

#### **5.4.3.1 Conditional fee arrangement and after-the-event insurance**

Based on the proposals by Lord Mackay, in 1995, the government decided to counterbalance the cut-backs in legal aid by permitting litigation funding by lawyers through Conditional Fee Arrangements (CFAs).<sup>375</sup> Before, the professional conduct rules of both solicitors and barristers did not allow payments related to a successful outcome.<sup>376</sup> The possibility of concluding a CFA was first introduced in specific cases only, such as personal injury and insolvency cases. As of 2000, it was extended to almost

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<sup>367</sup> For instance, in a derivative action by a minority shareholder, the Court of Appeal allowed the Law Society to waive professional regulation that prohibited contingency fees for a solicitor; *Wallersteiner v. Moir* (No. 2) [1975] QB 373 (CA), p. 394 ff.

<sup>368</sup> See *Neville v. London Express* [1919] AC 368, *Re Trepca Mines Ltd.* (No. 2), [1962] 3 WLR 955, and *Trendtex Trading Corp v. Credit Suisse* [1981] 3 WLR 766 (HL).

<sup>369</sup> *Trepca Mines* (No. 2) [1962] 3 WLR 955 (CA), p. 219-220.

<sup>370</sup> *Thai Trading v. Taylor and another* [1998] QB 781 (CA), p. 790.

<sup>371</sup> See section 5.4.3.1.

<sup>372</sup> *Giles v. Thompson* [1993] 2 WLR 908 (HL); *Factortame and others v. Secretary of State for Transport* (No. 2) [2002] EWCA Civ 932; *Papera Traders and others v. Hyundai Merchant Marine* (No. 2) [2002] EWHC 2130 (Comm); *London & Regional v. Ministry of Defence* [2008] EWHC 526 (TCC); *Sibthorpe and Morris v. London Borough of Southwark* [2011] EWCA Civ 25.

<sup>373</sup> Sime & French 2015, p. 247, Pirozzolo 2014, p. 158. See sections 5.2.4 and 5.4.5.

<sup>374</sup> See, for instance, Hodges, Peysner & Nurse 2012, p. 13.

<sup>375</sup> Courts and Legal Services Act 1990 (CLSA 1990), section 58, as activated by the Conditional Fee Agreements Order 1995 (SI 1995/1674) and Conditional Fee Agreements Regulations 1995 (SI 1995/1675). See Jackson 2009, Chapter 16, Sorabji & Musgrove 2009, p. 233, Hodges 2009a, p. 110, Reimann 2010, p. 27, Hurst 2013, p. 257 and Peysner 2014, p. 26 ff.

<sup>376</sup> Jackson 2010, Chapter 10.

all civil litigation.<sup>377</sup> Permitting CFAs had to be laid down in primary legislation, as otherwise the – remainder of – the doctrine of champerty and maintenance could render the arrangement unenforceable.<sup>378</sup> The CLSA defines a CFA as a contract whereby parties agree that (part of) the fees and expenses of the person providing advocacy or litigation services<sup>379</sup> are payable only in specified circumstances – usually, if the action is successful. If the CFA provides for a success fee, an uplift (the success fee) is charged in the case of success, expressed as a percentage of the normal, hourly fee (base costs).<sup>380</sup> If the claimant’s case is lost, he either pays no fee (‘no win, no fee’), which is the most common version,<sup>381</sup> or a low fee (‘no win, low fee’). A CFA is not the same as ‘no cure, no pay’ or a contingency fee. The latter includes a percentage of the proceeds instead of the base costs. Furthermore, under the English rule, ‘no cure’ still means ‘pay’: the adverse costs. This is why, promptly after the introduction of CFAs, the after-the-event insurance (ATE) made its entry to supplement CFAs: to cover the claimant’s risk of having to pay an adverse costs order.<sup>382</sup>

Initially, neither the ATE premium nor the success fee were recoverable from the defendants. In the case of a claimant’s success, the defendant had to pay the base costs through the adverse costs order, and the claimant would have to pay the success fee and the ATE premium out of the damages awarded. In 2000, following further legal aid cutbacks, the recoverability of CFA success fees and ATE premiums on a successful outcome were introduced to bridge the (potential) gap in access to justice.<sup>383</sup> The costs of CFA litigation were now placed on unsuccessful defendants. However, as discussed in section 5.3.5.2, in 2000, the recoverability was abolished as its incentives drove up litigation costs and created extensive satellite litigation. Claimants now pay the success fee, the base costs remain recoverable in the case of success. In this way, CFA claimants have an incentive to control the costs incurred on their behalf.<sup>384</sup> The government relies upon the market to set more reasonable success fees and premiums. Consequential to abolishing the recoverability of CFAs, the discussion on a reasonable percentage will now, normally, take place outside of court. The maximum percentage for a CFA remains 100% of the base costs.<sup>385</sup> In personal injury claims, the largest category of damages cases in which CFAs are concluded, the percentage is statutorily capped at 25% of the damages (non-pecuniary damages and past loss) for proceedings at first instance.<sup>386</sup>

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<sup>377</sup> Save for family law; CLSA 1990, section 58A(1)(b), as amended by the Access to Justice Act 1999, and proceedings under section 82 of the Environmental Protection Act 1990; see the Conditional Fee Agreements Order 2013, section 2.

<sup>378</sup> These doctrines will be discussed in section 5.4.5.

<sup>379</sup> This includes solicitors, barristers and CMCs; see section 5.2.

<sup>380</sup> CLSA 1990, section 58(2).

<sup>381</sup> Jackson 2009, p.

<sup>382</sup> Peysner 2014, p. 4 and 35, Jackson 2009, p. 156.

<sup>383</sup> Access to Justice Act 1999, sections 27 and 29; the former amended CLSA 1990, section 58 and implemented section 58A.

<sup>384</sup> UK Government, Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson’s Recommendations: The Government Response, March 2011, p. 6.

<sup>385</sup> CLSA 1990, section 58(4)(c) and Conditional Fee Agreements Order 2013, section 3.

<sup>386</sup> Save specific personal injury cases such as mesothelioma claims. In proceedings other than at first instance, the cap of 100% applies. See CLSA 1990, section 58(4A)(b), (c) and (d), and the Conditional Fee Agreements Order 2013, sections

CFAs can be and are being used in mass litigation as well. For instance, CFAs have been entered into in various GLOs, settlements that involved large numbers of aggrieved parties, and have been used to help fund the first collective proceedings before the Competition Appeal Tribunal.<sup>387</sup> Around 2009, ATE was denoted as an emerging market, although not yet widely available and difficult to obtain in mass litigation.<sup>388</sup> The August 2017 issue of *Litigation Funding* lists 27 ATE insurers for use with conditional fees.<sup>389</sup> However, ever since the recoverability of – usually substantial – ATE insurance premiums has been abolished,<sup>390</sup> difficulties with obtaining ATE insurance have increased. It might be arranged through third-party litigation funders,<sup>391</sup> but Burford has expressed its concerns on the lack of capacity in the ATE market to take on complex litigation.<sup>392</sup> Funding methods and issues in mass litigation will be further discussed within the context of the specific mechanisms, in section 5.5.

### 5.4.3.2 Damages-based agreements

In 2012, LASPO lifted the ban on damages-based agreements (DBAs; also known as contingency fees) in civil matters.<sup>393</sup> This, too, followed Sir Rupert Jackson’s recommendations. In his review, he presented various arguments in favour and against DBAs,<sup>394</sup> but ultimately, recommended that they should be permitted, subject to safeguards. Jackson’s main considerations were that an additional means of litigation funding is in the interest of the public, that DBAs do not affect defendants’ liability for adverse costs, that it is illogical to ban DBAs as they might incentivize efficiency yet allow CFAs that might incentivize inefficiency, and, in the commercial context, freedom of contract.<sup>395</sup> The government decided to adopt the recommendation. Not in order to fill an access to justice gap or to encourage litigation, but mainly to provide an alternative and useful form of private litigation funding.<sup>396</sup>

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4-6. On the measures that were implemented alongside in order to balance the irrecoverability of the success fee and ATE premium for personal injury victims, see section 5.3.5.3.

<sup>387</sup> For examples, see respectively *Motto and Others v. Trafigura & Trafigura Beheer* [2011] EWCA Civ 1150 (CA), *Young v. Brown and others* [2007] EWCA Civ 43, and *Gibson v. Pride Mobility Products* [2017] CAT 9.

<sup>388</sup> Sorabji, Napier & Musgrove 2008, p. 178, Mulheron 2009a, p. 195 and 226, Lee & Stech 2011, p. 141. See also *RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch), para. 130.

<sup>389</sup> *Litigation Funding*, August 2017, issue 110.

<sup>390</sup> Section 5.3.5.2.

<sup>391</sup> See, for instance, *Gibson v. Pride Mobility Products* [2017] CAT 9, para. 140 ff.

<sup>392</sup> Burford Annual Report 2016, p. 21.

<sup>393</sup> LASPO, section 45, amending CLSA 1990, section 58AA. The Damages-Based Agreements Regulations 2013 (SI 2013/609) further regulates the use of DBAs. Before 2013, DBAs were only allowed in non-contentious matters, including employment matters before tribunals. DBAs are not allowed in family proceedings, CLSA 1990, section 58AA(4)(aa), nor in opt-out collective proceedings, see hereafter.

<sup>394</sup> Jackson 2010, chapter 12.

<sup>395</sup> Jackson 2016a, p. 53-54.

<sup>396</sup> UK Government, *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson’s Recommendations: The Government Response*, March 2011, p. 13. See also Mulheron e.a. 2015, p. vi.

A DBA is defined as an arrangement between a person providing advocacy, litigation or claims management services – not: litigation funding<sup>397</sup> – and a client, whereby the representative's fee is contingent upon success and determined as a percentage of the financial benefit obtained by the client.<sup>398</sup> DBAs are statutorily capped at a maximum of 25% in personal injury cases (of non-pecuniary damages and past loss), 35% in employment cases, and 50% in any other case.<sup>399</sup> This cap applies to proceedings at first instance, on appeal the parties are free to negotiate the percentage.<sup>400</sup> The phrasing 'financial benefit' most likely refers to the money recovered by way of damages, not costs or expenses.<sup>401</sup> An important element of the DBA regulation is that the contingency fee is calculated on the obtained damages and deducted from the costs award.<sup>402</sup> In other words, recoverable costs fall within the DBA cap and the contingency fee is not charged on top of the recoverable costs. A successful claimant can recover the base costs (hourly fee and disbursements).<sup>403</sup> This means that if client A and his solicitor have agreed upon a contingency fee of 25%, and A wins the case, is awarded £ 100,000 in damages and the recoverable costs are £ 20,000, his solicitor receives £ 25,000 (not £ 45,000, i.e. £ 25,000 contingency fee + £ 20,000 recoverable costs).<sup>404</sup> In addition to the DBA fee, a client must pay the expenses incurred by his representative, such as expert reports and court charges, which fall outside the DBA cap.<sup>405</sup> The client is also liable for expenses incurred by himself, such as an ATE premium or litigation funding fee that might cover the adverse costs risk.<sup>406</sup>

There are various elements of the DBA regulation that, so far, have withheld solicitors from engaging in such a construction. For instance, 'obtained' in the definition of a DBA means that the contingency fee is based on the amount actually recovered. The enforcement risk of a damages award thus rests on the solicitor.<sup>407</sup> In addition, counsel's fee needs to be paid out of the contingency cap as well, unless client and counsel enter into an additional DBA. The maximum of 25% then applies to the combined DBAs. CJC has therefore recommended that counsel's fees should be kept outside the cap as expenses, since counsel and solicitor now 'share a limited pot of money', potentially causing a conflict of interests between counsel and solicitor.<sup>408</sup> The solicitor, for instance, might be incentivized to settle before trial, as trial consumes a substantial part of the pot. Moreover, as the size of counsel's fees are unpredictable in advance, a solicitor has an uncertainty problem when negotiating the contingency fee. Jackson made his recommendation in combination with recommending fixed costs, which would solve this problem. This recommendation, however, was not adopted by the government. Currently, counsel are

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<sup>397</sup> The DBA regime does not cover third-party funders' Litigation Funding Agreements (LFAs). See Mulheron e.a. 2015, p. 33, referring to the drafted DBA Regulations 2015, section 1(2). See also Mulheron 2014, p. 592 ff.

<sup>398</sup> CLSA 1990, section 58AA(3)(a) and DBA Regulations 2013, Explanatory Memorandum, § 2.1.

<sup>399</sup> DBA Regulations 2013, sections 4(2)(b), 7 and 4(3).

<sup>400</sup> DBA Regulations 2013, section 4(4).

<sup>401</sup> See the draft DBA Regulations 2015, section 1(2), which has not yet been implemented and is discussed in Mulheron e.a. 2015, p. 13 ff.

<sup>402</sup> DBA Regulations 2013, section 4(1)(a). Explanatory Memorandum, § 7.10. Mulheron e.a. 2015, p. 13 ff.

<sup>403</sup> See also section 5.3.5.3.

<sup>404</sup> This example is derived from Mulheron e.a. 2015, p. xi.

<sup>405</sup> DBA Regulations 2013, section 4(1)(b), and Explanatory Memorandum, § 7.13.

<sup>406</sup> Mulheron e.a. 2015, p. 8.

<sup>407</sup> Mulheron e.a. 2015, p. 16.

<sup>408</sup> Mulheron e.a. 2015, p. 3.



unprepared to act on a DBA, which is a strong disincentive for solicitors to enter into one.<sup>409</sup> Furthermore, the indemnity principle continues to be applicable.<sup>410</sup> Therefore, the defendant does not have to pay more adverse costs than the claimant owes his solicitor; this entails that if the recoverable costs exceed the cap, the defendant does not have to pay the remainder. Here too, Jackson's recommendation was set aside (to abolish the indemnity principle). The market has also developed a hybrid DBA, which entails a 'no win, low fee' agreement, whereby the solicitor charges a (significantly) lower fee in the case of loss.<sup>411</sup> Such an agreement is said to be particularly suitable for commercial litigation.<sup>412</sup> It is questionable, however, whether this type of DBA is allowed.

As a result of these and other more specific/technical elements of the DBA regulation, so far, DBAs have seldom been used as a source of litigation funding.<sup>413</sup> In 2015, the CJC issued a report, listing and addressing 56 elements that hamper its usage. The government has yet to respond to the report.<sup>414</sup>

Solicitors are not allowed to enter into a DBA arrangement in order to fund opt-out collective proceedings before the Competition Appeal Tribunal.<sup>415</sup> This ban is aimed at avoiding a 'litigation culture' and speculative litigation, which would place 'unjustified costs on defendant businesses' and create 'an incentive for lawyers to focus only on the largest cases'.<sup>416</sup> In other types of mass litigation, DBAs are allowed.<sup>417</sup> Mulheron has suggested to draft court rules to assess the reasonableness of the fees before any distribution of a damages award to the class can be made. Such an assessment should take into account the way the case was conducted, the size of the class, the degree of difficulty of the claim, the risk lawyers took on when agreeing the fee, and the work actually carried out.<sup>418</sup> So far, usage of DBAs in mass litigation has not been observed. As mentioned, funding methods and issues in mass litigation will be further discussed within the context of the specific mechanisms, in section 5.5.

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<sup>409</sup> Mulheron e.a. 2015, p. 4.

<sup>410</sup> CPR 44.18, see also Mulheron 2013, p. 244.

<sup>411</sup> See also Rowles-Davies 2014, p. 75.

<sup>412</sup> Jackson 2016a, p. 55-56.

<sup>413</sup> Jackson 2016a, p. 55.

<sup>414</sup> See Jackson 2016a, p. 55, and *Litigation Funding*, 'On the circuit', December 2016, issue 106, p. 8.

<sup>415</sup> CA 1998, section 47C(8) (inserted by the Consumer Rights Act 2015, Schedule 8, section 6) and CLSA 1990, 58AA(11). See also section 5.5.6.

<sup>416</sup> BIS, *Private actions in competition law: A consultation on options for reform – Government response*, 2013, p. 27 ff and 41. See, critically, Mulheron 2014a, p. 118 ff.

<sup>417</sup> Other than for opt-out collective proceedings, no carve-outs of DBA availability have been specified in LASPO or the DBA Regulations 2013; see Mulheron 2014a, p. 118.

<sup>418</sup> Mulheron 2014a, p. 120-121, referring to the adverse experiences in Canada and Australia, and the thereupon based draft rule in CPR 19.42, which was drafted in anticipation of the Financial Services Bill, which, ultimately, did not become law; see section 2.2.3.

#### 5.4.4 Claims Management Companies

Currently, 1,388 CMCs are authorised, of which approximately 50% operate in the financial claims sector.<sup>419</sup> CMCs cannot have a right of audience, but act as intermediaries between litigants and lawyers.<sup>420</sup> As to financial claims, CMCs mainly operate by addressing the client's opponent directly or taking its complaint to the Financial Ombudsman. They do so in bulk, creating economies of scale through standardised processes.

The DBA regime applies to CMCs as well.<sup>421</sup> However, in spite of the increasing regulatory oversight as discussed in section 5.2.3, problems with CMCs have yet to end. Various policy reforms have been announced. In 2016, the Ministry of Justice issued a consultation paper, which states that the problems with CMCs in the financial claims sector are threefold: i) the charged fees are deemed to be too high (both the upfront payments and the percentages of the final compensation), ii) CMCs are said to pursue a high level of speculative claims and nuisance calls are made to consumers, and iii) in specific (bulk) claims, they add little to nothing to the claims process.<sup>422</sup> The problems arise in particular in cases concerning misold Payment Protection Insurance (PPI), for which online and free complaint forms are available and access to the Financial Ombudsman is free and said to be consumer-friendly.<sup>423</sup> The Ministry has proposed to cap the fees more rigidly than the regulatory regime for DBAs. For instance, for bulk claims the cap is set at 15%<sup>424</sup> of the net amount of the final compensation awarded if the total net value of all relevant claims equals £ 2,000 or less, and for claims with a larger total net value at £ 300. Under the DBA Regulations 2013, in financial claims, CMCs (or solicitors) can take up to 50% of the damages.<sup>425</sup> The Ministry has also proposed a ban on charges to a consumer that does not have a relationship or relevant policy with the lender, on referral fees,<sup>426</sup> and – in general, for all types of financial claims – on any upfront fees being charged. The assumption is that lowering the potential earnings will have a positive effect on the marketing strategy of CMCs.<sup>427</sup> Recently, the consultation was followed by the introduction of the Financial Guidance and Claims Bill.<sup>428</sup> The bill aims to establish

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<sup>419</sup> Ministry of Justice, *Claims Management Regulation Annual Report 16/17*, p. 15, 19 and 21, and Ministry of Justice, *Claims Management Regulation – Consultation. Cutting the costs for consumers – Financial Claims*, 2016, p. 8.

<sup>420</sup> See Tzankova & Kortmann 2010, p. 118-119, and Peysner 2014, p. 71. See also section 5.5.1.

<sup>421</sup> See CLSA 1990, sections 58AA(3)(a) and (7), and the Damages-Based Agreements Regulations 2013, section 1(2).

<sup>422</sup> Ministry of Justice, *Claims Management Regulation – Consultation. Cutting the costs for consumers – Financial Claims*, 2016.

<sup>423</sup> Ministry of Justice, *Claims Management Regulation – Consultation. Cutting the costs for consumers – Financial Claims*, 2016, p. 9 ff. See also, for instance, <[fca.org.uk/consumers/payment-protection-insurance/claim-back-money-sale-ppi](http://fca.org.uk/consumers/payment-protection-insurance/claim-back-money-sale-ppi)>.

<sup>424</sup> Damages-Based Agreements Regulations 2013, section 4(3).

<sup>425</sup> *Ibid.*, p. 5 and 25 ff.

<sup>426</sup> Following Jackson's recommendation, referral fees in personal injury cases have been prohibited since 2013; LASPO 2012, section 56. The ban also applies to claims management companies.

<sup>427</sup> *Ibid.*, p. 20.

<sup>428</sup> Financial Guidance and Claims Bill [HL] (as introduced in June 2017), Part 2, available at <[services.parliament.uk/bills/2017-19/financialguidanceandclaims.html](http://services.parliament.uk/bills/2017-19/financialguidanceandclaims.html)>. See also House of Commons Library / T. Edmonds, *Claims Management Companies (Briefing Paper)*, Number 06075, 21 June 2017.

a tougher regulatory framework for CMCs, ensuring consumer protection against malpractice and continuing access to high-quality claims management services.<sup>429</sup> If enacted, claims management services will fall under the Financial Services and Markets Act 2000, which will transfer responsibility for claims management regulation from the Ministry of Justice to the FCA. The proposal includes the FCA's authority (and, in relation to financial products and services, its obligation) to make rules to protect consumers against excessive charges.<sup>430</sup> The CMR is currently considering an interim regime on fee capping.<sup>431</sup>

As to PPI claims, CMCs' activities might increase in the short term, but will probably slowly decline, since the FCA has recently introduced a deadline for making new claims; the deadline is set at 29 August 2019.<sup>432</sup> However, CMCs continue to explore activities in new areas. For instance, since 2016, there has been an upsurge in claims in the so-called holiday sickness claims market. Unfortunately, this market has become a new 'key priority area' for CMR, as these claims are sometimes false and are mainly fuelled by some questionable activities by CMCs:

*'Along with the increased activity has come information about misconduct, including reports of claims 'touts' operating at holiday resorts abroad approaching UK holidaymakers to encourage them to make a claim. (...) Allegations have been made that (...) call centre operatives are encouraging clients to say that they have become ill during their holiday due to food hygiene at their hotel in cases where this is not the truth.'*<sup>433</sup>

The scale of the problem and the negative consequences thereof for the UK's travel industry and reputation abroad have recently prompted British ministers to step in, announcing that they are going to tackle the 'compensation culture which has penalised the honest majority for too long'.<sup>434</sup> In addition to warning holidaymakers that they can face up to three years in prison if found guilty of making a fraudulent claim, and calling on the travel industry to come forward with further evidence, the ministers have asked the Civil Procedure Rule Committee<sup>435</sup> to urgently look at the rules governing the costs of holiday claims,<sup>436</sup> and the Civil Justice Council (CJC)<sup>437</sup> to look into low value personal injury claims in general and, more specifically, how to reduce the incentives to bring meritless claims. Meanwhile, the CMR continues to take action to tackle CMCs' misconduct.<sup>438</sup>

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<sup>429</sup> See the Financial Guidance and Claims Bill [HL], Explanatory Notes, p. 10 ff.

<sup>430</sup> Financial Guidance and Claims Bill, section 17(2)

<sup>431</sup> Ministry of Justice, *Claims Management Regulation Annual Report 16/17*, p. 43.

<sup>432</sup> See the FCA's press release, published in March 2017 at <[fca.org.uk/news/press-releases/fca-finalise-plans-place-deadline-ppi-complaints](http://fca.org.uk/news/press-releases/fca-finalise-plans-place-deadline-ppi-complaints)>.

<sup>433</sup> Ministry of Justice, *Claims Management Regulation Annual Report 16/17*, p. 32.

<sup>434</sup> See the press release 'Crackdown on fake holiday sickness claims', issued by CMR in July 2017, available at <[gov.uk/government/news/crackdown-on-fake-holiday-sickness-claims](http://gov.uk/government/news/crackdown-on-fake-holiday-sickness-claims)>.

<sup>435</sup> See footnote 5.

<sup>436</sup> The ministers have proposed to extend the fixed recoverable costs regime to cover claims that arise abroad. This regime currently only applies to personal injury claims in England and Wales. See also section 5.3.2.3.

<sup>437</sup> The CJC is an advisory body pursuant to the Civil Procedure Act 1997; see <[judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/](http://judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/)>.

<sup>438</sup> See, for instance, <[gov.uk/government/news/licence-stripped-from-holiday-sickness-firm](http://gov.uk/government/news/licence-stripped-from-holiday-sickness-firm)>.

In personal injury cases, future reforms are likely to change CMCs practices as well, in addition to the recent prohibition of referral fees in personal injury cases in 2013.<sup>439</sup> In 2017, a consultation document was issued, suggesting to introduce fixed recoverable costs for clinical negligence claims up to £ 25,000, as currently for such claims, on average, recoverable legal costs are 220% of the awarded damages. Another disincentive for CMCs' (or solicitors') activities is the proposed reform of whiplash claims (road traffic accident-related soft-tissue claims), *inter alia*, the introduction of a tariff of fixed compensation for pain, suffering and loss of amenity for injuries with a duration of less than two years.

#### **5.4.5 Third-party litigation funding**

As discussed in section 5.2.4, third-party litigation funding (TPF) emerged after the authorisation of CFAs in 1995. It was statutorily addressed in 2000, but the specific provision has not (yet) become operative.<sup>440</sup> The provision defines a Litigation Funding Agreement (LFA) as an agreement under which a funder agrees to fund (in whole or in part) the provision of advocacy or litigation services (by someone other than the funder) to a litigant, and under which the litigant agrees to pay a sum to the funder in specified circumstances. Thus, a funder enables a claimant to meet its costs of litigation. This can include the risk of having to pay the opponent's costs. The funder, in turn, can cover such a risk through ATE insurance.<sup>441</sup> In return for (pre)financing litigation, the funder receives a share of the proceeds in the case of success, as defined in the LFA. If the funder, claimant and its solicitor have also entered into a hybrid DBA construction, part of the proceeds will be split between funder and solicitor.<sup>442</sup>

The relationship between funder and claimant is fully governed by contract, general civil law, and – if the funder is an ALF member – the ALF Code of Conduct.<sup>443</sup> The DBA Regulation 2013 does not apply to litigation funders and thus does not cover LFAs. Additional regulation that requires a litigation funder to be approved by a designated body has not been drafted.<sup>444</sup>

In light of the doctrines of maintenance and champerty, third-party funding was initially approached with concern. Since the endorsement by the judiciary, notably the *Arkin* case in 2005, the CJC, and Sir

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<sup>439</sup> LASPO 2012, section 56; see section 5.2.2. See Jackson 2017, p. 16, with further references to the relevant reforms.

<sup>440</sup> CLSA 1990, section 58B, as inserted by the Access to Justice Act 1999, section 28. On the history of third-party litigation funding see, for instance, Mulheron & Cashman 2008, Jackson 2009, Chapter 15, and Rowles-Davies 2015, Chapter 2.

<sup>441</sup> See sections 5.4.3.1 and 5.5.6.

<sup>442</sup> See section 5.4.3.2.

<sup>443</sup> See section 5.2.4.

<sup>444</sup> Mulheron 2014, p. 595. The CLSA provision on litigation funding agreements (section 58B; not in force) includes the provision that the funder must be a person, or person of a description, prescribed by the Secretary of State; CLSA 1990, section 58B(3)(a) and (4).

Rupert Jackson, TPF has become a recognised funding mechanism.<sup>445</sup> In *Factortame*, the Court of Appeal had already determined that only in abusive circumstances would a litigation funding agreement be held contrary to public policy, the remnant of the doctrines of maintenance and champerty:

*'[w]here the law expressly restricts the circumstances in which agreements in support of litigation are lawful, this provides a powerful indication of the limits of public policy in analogous situations. Where this is not the case, then we believe one must today look at the facts of the particular case and consider whether those facts suggest that the agreement in question might tempt the allegedly champertous maintainer for his personal gain, to inflame the damages, to suppress evidence, to suborn witnesses or otherwise to undermine the ends of justice.'*<sup>446</sup>

A particular point of debate concerns the level of control over the conduct of litigation that a funder might exert. The primarily interested person and, thus, the one in control is and should be the claimant, the court clarified in *Arkin v. Borchard*:

*'Our approach is designed to cater for the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable. Such funding will leave the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation.'*<sup>447</sup>

In 2012, Veljanovski reported that the predominant model of litigation funding in the UK is passive funding, correlating with the doctrines of champerty and maintenance that prevent funders from actively participating.<sup>448</sup> A passive funder's main role in litigation is to foot the bills, contrary to active funders, who organize the action, or participate therein, and thus play an active role in litigation and/or settlement negotiations.<sup>449</sup> However, a shift towards more active participation by third-party litigation funders is noticeable. The ALF Code of Conduct prescribes that an LFA should state whether, and if so how, the funder (or its subsidiary or associated entity) may provide input to the funded party's decision in relation to a settlement.<sup>450</sup> Jackson deems such input to be reasonable and possibly advantageous:

*'(...) the funder has a stake in the litigation. It is or should be entitled to be consulted. In addition funders build up substantial experience in the fields of litigation in which they operate. Therefore their views may on occasions be a positive asset for the client and its legal team.'*<sup>451</sup>

A funder cannot take steps that (might) cause the funded party's solicitor or barrister to act in breach of their professional duties, nor seek to influence the solicitor or barrister to cede control or conduct

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<sup>445</sup> See *Arkin v. Borchard Lines* [2005] 1 W.L.R. 3055 (CA), the CJC Reports *Improved Access to Justice – Funding Options & Proportionate Costs* of August 2005 (Napier e.a. 2005) and June 2007 (Napier e.a. 2007), and Jackson 2009 and 2010 (Chapters 15 respectively 11).

<sup>446</sup> *Factortame v. Secretary of State for Transport* [2002] EWCA Civ 932, consideration 36.

<sup>447</sup> *Arkin v. Borchard Lines* [2005] 1 W.L.R. 3055 (CA), para. 40.

<sup>448</sup> Veljanovski 2012, p. 408.

<sup>449</sup> See section 3.3.

<sup>450</sup> Code of Conduct for Litigation Funders, section 11.1.

<sup>451</sup> Jackson 2011, at 3.9. See similarly Friel, Barnes & Bird 2016, p. 26.

of the dispute to the funder.<sup>452</sup> Threatening to terminate the contract might be considered a means of exercising undue control over the litigation and, thus, be held to be contrary to public policy as well.<sup>453</sup> Undue control of the litigation can also be making demands on the choice of counsel. Such choice can play a role, however, in the funder's decision as to whether or not to fund the case.<sup>454</sup> It is said to have become more and more common for litigation funders to attend hearings and settlement discussions, and to provide input on the settlement decision:

*'It is standard for English litigation funding agreements to provide that third-party funders will be kept abreast of settlement discussions and offers, and some agreements will also provide that settlement offers within a given range will be considered reasonable and should be accepted.'*<sup>455</sup>

Nowadays, a certain level of input has been completely accepted.<sup>456</sup> This has been further fuelled by the Excalibur case, where litigation funders were held liable for the adverse costs order, even though they were not party to the proceedings and had not behaved wrongfully.<sup>457</sup> The ALF, which was allowed to intervene in the appeal, subsequently welcomed the judgment as it would wield the unprofessional ad hoc funders from those who underwrite the association's Code of Conduct.<sup>458</sup> It welcomed the judgment as it endorsed litigation funding and, in addition, addressed funders' concerns that if they exercise greater control over the litigation conduct, this will be characterised as champertous. On this topic, the Court of Appeal ruled:

*'I understand why this concern is raised but I consider that it is unrealistic. As the judge pointed out, champerty involves behaviour likely to interfere with the due administration of justice. Litigation funding is an accepted and judicially sanctioned activity perceived to be in the public interest. What the judge characterised as "rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate intervals" is what is to be expected of a responsible funder (...) and cannot of itself be champertous. I agree (...) that, rather than interfering with the due administration of justice, if anything such activities promote the due administration of justice. For the avoidance of doubt I should mention that on-going review of the progress of litigation through the medium of lawyers independent of those conducting the litigation, a fortiori those conducting it on a conditional fee agreement, seems to me not just prudent but often essential in order to reduce the risk of*

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<sup>452</sup> Code of Conduct for Litigation Funders, sections 9.2 and 9.3.

<sup>453</sup> Friel, Barnes & Bird 2016, p. 26.

<sup>454</sup> Friel, Barnes & Bird 2016, p. 26. See also section 5.2.4 and the Code of Conduct for Litigation Funders, section 9.3.

<sup>455</sup> Friel, Barnes & Bird 2016, p. 26.

<sup>456</sup> See section 5.2.4.

<sup>457</sup> Excalibur v. Texas Keystone and Others [2016] EWCA Civ 1144. The case is discussed more elaborately in section 5.3.6.2.

<sup>458</sup> The funders in the case at hand were not ALF members. See the statement and press release, published on 18 November at <[associationoflitigationfunders.com/2016/11/statement-from-the-association-of-litigation-funders-of-england-wales-regarding-the-court-of-appeal-judgment-in-excalibur/](http://associationoflitigationfunders.com/2016/11/statement-from-the-association-of-litigation-funders-of-england-wales-regarding-the-court-of-appeal-judgment-in-excalibur/)> and <[associationoflitigationfunders.com/wp-content/uploads/2016/11/ALF-Excalibur-Press-Release-181116-.pdf](http://associationoflitigationfunders.com/wp-content/uploads/2016/11/ALF-Excalibur-Press-Release-181116-.pdf)>. See, similarly, P.J. Kirby, 'A double-edged sword', *Litigation Funding*, February 2017, issue 107, who argues that Excalibur also entails good news for funders.

*orders for indemnity costs being made against the unsuccessful funded party. When conducted responsibly, as by the members of the ALF I am sure it would be, there is no danger of such review being characterised as champertous.*<sup>459</sup>

In 2016, Jackson noted that the volume of third-party funding has hugely increased, due to the abolished recoverability of CFA success fees and ATE premiums, the decreasing popularity of CFAs, the acceptance of third-party funding as a respectable alternative to fund litigation, its good return on investment, and costs management that has made it much easier to assess the risks and benefits of (funding) litigation, such as the adverse costs risk.<sup>460</sup> Currently, eight litigation funders are listed as members of the Association of Litigation Funders (ALF), a self-regulatory body.<sup>461</sup> Membership is not compulsory. The August 2017 issue of *Litigation Funding* lists some 11 other funders. Most likely, this overview does not show all of the players; the market development is said to be at the early adopter stage and the market is likely to continue to grow.<sup>462</sup> In its Annual Report 2016, the litigation funding industry leader Burford reports the following on the growth of the litigation funding market:

*We have seen truly dramatic change in our industry in the last several years. In a surprisingly short period of time, client demand for financial solutions related to legal and regulatory risk has increased considerably and has prompted a consequent increase in the amount of capital available to clients (...) [W]e have no data to enable us to project what proportion of the total legal pie we and our competitors could occupy in the future (...). All we can tell you at this point in our evolution is that nothing we see in the market leads us to believe that our miniscule share of total global legal spend is not capable of ongoing expansion.*<sup>463</sup>

The market is said to be increasingly competitive; a litigant with a 'good case' is said to be readily able to find litigation funding on attractive commercial terms.<sup>464</sup> However, Burford states the following:

*'There is (...) persistent interest from prospective entrants in the market, but many would-be entrants are unsuccessful in raising capital as investors tend to be sceptical of small teams of lawyers lacking track records in business or investment management. We are unable to ascertain accurately how much capital is available in the sector due to the secrecy of market participants (...). Nonetheless, we believe that there are some billions of dollars in litigation finance capital available globally. As a general matter, litigation finance investing tends to occur in pure play specialist firms (like Burford) that do not provide other kinds of corporate financing, which is a partial insulation to widespread competition. Much as we view litigation dispassionately as a financial asset, there is nonetheless emotion associated with litigation, even at a corporate level, and businesses with activities in other parts of the financial services market generally find that the relationship downside of financing corporate litigation is harmful to their other lines of business. Moreover, this is not a business for*

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<sup>459</sup> *Excalibur v. Texas Keystone and Others* [2016] EWCA Civ 1144, para. 31.

<sup>460</sup> Jackson 2016, p. 6.

<sup>461</sup> See section 5.2.4.

<sup>462</sup> Pirozzolo 2014, p. 156, Burford Annual Report 2016, p. 4-7.

<sup>463</sup> Burford Annual Report 2016, p. 4 and 6. Burford Capital is publicly traded on the London Stock Exchange. It has its main offices in London, New York and Chicago.

<sup>464</sup> Friel, Barnes & Bird 2016, p. 25.

*dabblers; entrants need significant teams of experienced and expensive people and need to be able to make a significant capital commitment to achieve the necessary portfolio diversification. Nevertheless, investors have a natural concern that competition could lead to price reduction and margin compression and ultimately to lower returns and deteriorating profitability. We believe that is not a near-term threat. (...)*

*[N]ew entrants need to raise capital to compete. The providers of that capital can see Burford's publicly disclosed returns, and sensibly demand comparable returns from new entrants. Thus, discounting to achieve volume will result in immediate underperformance by the new entrant, which will in turn lead to investor unhappiness and the refusal to advance incremental capital.<sup>465</sup>*

Third-party funders are particularly active in high value cases that provide a reasonable to good prospect of a financial reward for the funder.<sup>466</sup> Generally, they have set a minimum threshold as to the value of the claim; this varies between £ 1 million to £ 5 million, but in practice, this threshold may be left for sound cases with a prospect of quick recovery.<sup>467</sup> Funders are not inclined to engage in actions for specific performance and injunctive relief, as there is no financial outcome in which to share.<sup>468</sup> The range and number of cases that are funded further depend on the funder and its selection criteria. Generally, the selection criteria are: the subject matter, the merits and value of the claim, the forum and the applicable law, and enforceability (obtaining the proceeds of litigation and a return on its investment).<sup>469</sup> Moreover, the type of client is important. Since control over litigation remains in a claimant's hands, a funder will want to know how it will respond in certain situations and what its motivation is for bringing the claim.<sup>470</sup> A 2014 survey showed that 65% of private practice lawyers said their clients use TPF because of limited resources, 19% because it helped their balance sheet, 14% because it allowed them to more effectively manage resources, and 2% because it helped them retain a top quality lawyer instead of an average one.<sup>471</sup> The selection of cases requires thorough due diligence and the search for (appropriate) litigation funding can be a complex and time-consuming process.<sup>472</sup>

Third-party funders are increasingly active in mass litigation. For instance, in 2016, Burford reported:

*As an example of the rate of change in our business (...) only 12% of our new investment commitments in 2016 were in single litigation case matters. In 2009, that number was 100%. The remainder of our investment commitments are now in what we call either portfolio or complex matters.<sup>473</sup>*

Illustrative, too, is the fact that in the collective proceedings that have been brought before the Competition Appeal Tribunal so far, a third-party litigation funder was involved.<sup>474</sup>

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<sup>465</sup> Burford Annual Report 2016, p. 7.

<sup>466</sup> Jackson 2010, p. 118.

<sup>467</sup> Veljanovski 2012, p. 419; Rowles-Davies 2014, p. 69 ff.

<sup>468</sup> Veljanovski 2012, p. 419.

<sup>469</sup> Rowles-Davies 2014, p. 64 ff.

<sup>470</sup> Rowles-Davies 2014, p. 67.

<sup>471</sup> Burford & The Lawyer, *UK litigation and arbitration funding barometer*, issue 1, 2015.

<sup>472</sup> See, for instance, *Estera Trust and another v. Singh and others* [2017] EWHC 2805.

<sup>473</sup> Burford Annual Report 2016, p. 5.

<sup>474</sup> These cases will be further discussed in section 5.5.6.



As discussed in section 5.3.5.4, a third-party funder's fee (contingency fee) cannot be recovered from defendants as adverse costs in civil litigation. It depends on the construction of the funding arrangement and the mass litigation instrument whether and to what extent a represented class member pays the funder. The charged percentage depends on case-specific factors and competitive limits.<sup>475</sup> The level of the contingency fee is not generally subject to court approval. Any excessive percentage could be considered contrary to public policy. According to Mulheron, accepted percentages vary between 8 and 55%.<sup>476</sup> For instance, in the proposed collective proceedings regarding the truck manufacturers' cartel, the intended claimant has secured funding from a third-party litigation funder and the adverse costs risk is covered by ATE insurance.<sup>477</sup> Represented parties only pay in the case of success. As to the level thereof, the claimant's website mentions the following:

*Based on conservative assumptions in relation to the level of damages per truck and the overall number of trucks that are in the RHA's claim, the level of return to the funder will be at most 9% and may be as low as 5%. If the case settles early, these percentages will be reduced by a third, thereby returning even more of the compensation to operators.*<sup>478</sup>

Information on assistance by a litigation funder and the general terms of funding is increasingly publicly disclosed, for instance on the – intended – claimant's website. There is no general obligation, however, to disclose specific information on the funding arrangement.<sup>479</sup> Litigation funding documents might entail confidential (company) information and/or give rise to strategic or abusive behaviour on the defendant's side. For instance, an LFA will include terms on settlement negotiations, claim valuation, terms and the amount of funding, definitions of success, provisions as to termination and the funder's return on its investment.<sup>480</sup> Some information might fall under the privilege of legal advice, such as references to the merits or litigation strategy, terms of the funding and the reasons/interpretation thereof. In its decision as to whether the disclosure of documents should be ordered, in relation to the privilege of legal advice, the court assesses whether specific information explicitly or implicitly reveals the content of legal advice or 'betrays the trend of the advice'.<sup>481</sup>

As mentioned, funding issues in mass litigation will be further discussed within the context of the specific mechanisms, in section 5.5.

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<sup>475</sup> Friel, Barnes & Bird 2016, p 25.

<sup>476</sup> Mulheron 2014, p. 584.

<sup>477</sup> <[rha.uk.net/news/press-releases/2017-06-june/rha-launches-funded-legal-action-against-the-truck-cartel](http://rha.uk.net/news/press-releases/2017-06-june/rha-launches-funded-legal-action-against-the-truck-cartel)>. See <[truckcartellegalaction.com](http://truckcartellegalaction.com)>.

<sup>478</sup> The brochure is available at <[cdn2.hubspot.net/hubfs/3387682/documents/truck-cartel-bm-version.pdf?t=1500302050164](http://cdn2.hubspot.net/hubfs/3387682/documents/truck-cartel-bm-version.pdf?t=1500302050164)>.

<sup>479</sup> See also section 5.3.3.

<sup>480</sup> *Estera Trust and another v. Singh and others* [2017] EWHC 2805 (Ch), para. 20.

<sup>481</sup> See *Lyell v. Kennedy* (No. 3) [1884] 27 Ch D 1, *Ventouris v. Mountain* (No. 1) [1991] 1 WLR 607, p. 615, and *Estera Trust and another v. Singh and others* [2017] EWHC 2805 (Ch), para. 28 ff.

#### 5.4.6 Special purpose vehicles: the assignment model

Entrepreneurial mass litigation can also take place by way of the so-called assignment model. This option mechanism has been created in practice. Under such a construction, a company (also known as a special purpose, claim or litigation vehicle) purchases (the cause of action of) claims of aggrieved parties and by way of joinder enforces them in its own name and on its own account and risk. The business model has been employed in competition law cases in various European jurisdictions.

Recognition of the assignment model depends in particular on the law on 1) claim transfer and sale/assignment, and 2) the standing of the litigation vehicle that joins the claims.

As to the first element, nowadays, English law generally permits the purchase and transfer of the proceeds of an action (in which case the claim owner retains control over litigation), and sometimes that of a cause of action. If the latter assignment is effective, the assignee may bring a claim or continue litigation under its own name.<sup>482</sup> Thus, the original claim owner normally loses control over litigation. Different variations of the rules apply, for instance between claims in tort and claims in contract, and whether they concern the right to litigate a purely personal claim, or whether the assignment is contractually prohibited.<sup>483</sup> Originally, a cause of action could not serve as a marketable commodity.<sup>484</sup> This has been attributed to the danger that the assignee 'may buy up the claim at a small figure and use it to get a big profit for himself.'<sup>485</sup> However, public policy has changed over time. In the landmark ruling in *Trendtex Trading v. Credit Suisse*, the House of Lords held that an assignment of a bare cause of action is valid 'if the assignee had a genuine commercial interest in taking the assignment and in enforcing it for his own benefit'.<sup>486</sup>

It remains questionable, however, whether the current notion of public policy allows, as such a genuine interest, that of an entrepreneurial party that enables mass litigation – also – for its own benefit. Some have argued that a 'genuine commercial interest' in the enforcement of a claim can be interpreted liberally, others are more hesitant to arrive at such a conclusion.<sup>487</sup> In light of the access to justice debate and the shift in favour of third-party litigation funding, it might very well be argued that (bundled) assignment does not undermine 'the integrity of the litigation process'.<sup>488</sup> Either way, the remainder of the doctrines of maintenance and champerty may have withheld litigation vehicles, so far, from filing claims under the assignment model. The method does not seem to have gained ground in England and Wales.<sup>489</sup> In spite of the continuing relaxation of the doctrines of champerty and maintenance, it is questionable whether the model will do so in the future. This is related to the fact that the model has been used mainly in competition law cases, where the introduction of the collective proceedings instrument now provides an alternative mechanism to obtain collective redress, possibly

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<sup>482</sup> See *Casehub v. Wolf Cola* [2017] EWHC 1169 (Ch), para. 39.

<sup>483</sup> See Chitty on Contracts, 16-066 and 16-069, with further references to case law, and Sime & French 2015, p. 245 ff.

<sup>484</sup> *De Hoghton v. Money* [1866] LR 2 Ch App 164.

<sup>485</sup> See, for instance, *Trendtex Trading and another v. Credit Suisse* [1980] 3 WLR 367 (CA), p. 656.

<sup>486</sup> *Trendtex Trading and another v. Credit Suisse* [1981] 3 WLR 766 (HL), p. 703.

<sup>487</sup> See Pinna 2010, p. 115, with further references.

<sup>488</sup> See section 5.4.2.

<sup>489</sup> Hodges, Peysner & Nurse 2012, p. 64 and 84 and Sorabji 2014a, p. 13-14.

initiated or funded by an entrepreneurial party. In its response to the public consultation, CDC, a well-known special purpose vehicle that operates under the assignment model, has urged the necessity of explicit recognition of the validity of the assignment model as an alternative to collective proceedings and clarification that it does not infringe public policy.<sup>490</sup> As will be discussed in section 5.5.6, it seems that the government has reconsidered its initial position that special purpose vehicles should be excluded from bringing collective proceedings. From this policy decision, it might be inferred that the aforementioned liberal approach towards a 'genuine commercial interest' is tenable. This will be further discussed in section 5.5.4, where recent case law is discussed that demonstrates a further shift of public policy towards accepting new forms of entrepreneurial mass litigation that enable access to justice, at least in low value claims which otherwise are not likely to be pursued.

As for the second element, the standing of the litigation vehicle that joins the claims, English civil procedure does not have a general requirement to establish standing, it is a concept that is rarely referred to in civil proceedings.<sup>491</sup> It is not a separate requirement in procedural rules, independent of the claimant's substantive right of action. A claimant needs to have a substantive right of action. 'If he does, he has standing to sue, and if he does not, he cannot claim.'<sup>492</sup> Nevertheless, specific rules on standing can be found in various places. For instance, pursuant to the Senior Courts Act 1981, an applicant for judicial review has to have a sufficient interest in the matter.<sup>493</sup> A similar provision can be found in the Competition Act, it stipulates that the CAT rules may reject proceedings if the person bringing the claim does not have a sufficient interest in the decision.<sup>494</sup> Four other examples are laid down in CPR Part 19II. For instance, CPR 19.9 stipulates that, if the court so permits, one or more members of a company (e.g. shareholders), body or trade union, can bring a derivative action on behalf of the company (instead of the company itself) if the company declines to pursue the claim itself.<sup>495</sup> For litigation vehicles, no specific regulatory provisions apply. Furthermore, as of 2013, the Directive on Antitrust Damage Actions confirms the standing of, inter alia, a person that has succeeded in the alleged injured party's right, including the person that has acquired the claim.<sup>496</sup>

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<sup>490</sup> CDC Cartel Damage Claims, Comments on the UK Government's Proposals on Private Actions in Competition Law: A Consultation on Options for Reform, Brussels, July 2012.

<sup>491</sup> Uff 2013, p. 198-199.

<sup>492</sup> Uff 2013, p. 199.

<sup>493</sup> Senior Courts Act 1981, section 31(3). This rule of *locus standi* is generally approached generously, see Lee & Stech 2011, p. 145, with further references, and Macrory 2013, p. 206.

<sup>494</sup> Competition Act, Schedule 4 (Enterprise Act 2002), section 12(a). This stipulation does not apply to sections 47A and 47B, see hereafter section 5.5.6.

<sup>495</sup> The first is the representative action (CPR 19.6) as will be discussed in section 5.5.2. A representative party can also bring an action for persons who cannot be ascertained in relation to the estate of a deceased person, properly subject to a trust, or the meaning of a document or statute (CPR 19.7), or for a person who has died (CPR 19.8).

<sup>496</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing action for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, sections 2(4) and 7(3). See Schreiber & Seegers 2015, p. 4, who also refer to the opinion of AG Jaaskinen (11 December 2014, Case C-352/13, para. 29) in which he states that the emergence of litigation vehicles seems to show that it is not reasonable to expect aggrieved parties to individually enforce such a claim.

As to a potential adverse costs order, a problem that arises under this model is the asymmetric litigation cost risk. With competition law infringements, the number of cartel members might be large. Since they can be held jointly and severally liable for the damage caused, defendants in such litigation often instigate third-party proceedings or notices. Such actions substantially increase litigation costs, for which the claimant (the litigation vehicle) can be held liable in the case of loss by way of the adverse costs order. In order to balance the cost risk, to create a true level playing field, and to avoid any abusive use of such third-party proceedings or notices, CDC has suggested, *inter alia*, to limit a claimant's obligation for adverse costs to the amount it would be entitled to receive in case of success, and/or to limit the claimant's obligation to provide security for adverse costs.<sup>497</sup>

#### **5.4.7 Contingency Legal Aid Fund**

As will be clear by now, the budget cuts, the financial crisis and reforms resulting from the Jackson review have incited the development of various private litigation funding arrangements. One is still under construction: the Contingency Legal Aid Fund (CLAF). Within the context of collective redress, around 2005, the CJC started to explore whether the implementation of a CLAF was viable.<sup>498</sup> Basically, such a self-funding fund, administered by a private or public body, funds eligible claimants, and in the case of success receives a percentage from the proceeds. Therewith, future actions are funded. However, the CJC – and, subsequently, the government – concluded that such a scheme would only function properly (profitably) if competing funding arrangements were unavailable. As this was not the case, they deemed the implementation of such a fund unviable.

Although Jackson seemed hesitant in his preliminary report, in his final report he suggested to undertake financial modelling to further explore the viability of a CLAF.<sup>499</sup> He reinvestigated the CLAF in 2016, prompted by the fact that, in certain areas, legal aid is not available, CFAs are hardly used and there is a need for funding in these cases. Jackson considered that the time was ripe for reviving the idea, as the dust of the reforms that followed his recommendations in 2010 had settled and third-party funding has proven to be successful. According to Jackson, in effect, a CLAF would operate as a third-party funder, the difference being that a CLAF does not have to put food on the table of shareholders or other commercially interested parties. It would be a fully non-profit fund solely aimed at promoting access to justice, complementing both commercial and public funding structures. Eligible claimants could be those pursuing commercial or other claims, such as individuals or firms of modest means with a claim whose amount of dispute would probably result in – commercial – third-party funding being declined. Case and costs management techniques help the operation of a CLAF, as a cost risk is better assessable (see also hereafter on the increase of TPF, for which the same applies). The possible future fixed costs reforms in all civil cases up to a certain amount might also benefit the operation of a CLAF, as it increases certainty as to the adverse costs risk, and furthermore avoids the

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<sup>497</sup> CDC Cartel Damage Claims, Comments on the UK Government's Proposals on Private Actions in Competition Law: A Consultation on Options for Reform, Brussels, July 2012.

<sup>498</sup> Napier e.a. 2005 and Napier e.a. 2007. See similarly Jackson 2009, p. 183 and 187. Earlier proposals to introduce a CLAF date back to 1978; for a brief historical overview, see Jackson 2016, § 2.2.

<sup>499</sup> Jackson 2010, p. 140.

expense of costs management and assessment. Recently, Jackson has invited the Law Society, the Bar Council and CILEx to consider jointly setting up such a fund.<sup>500</sup>

In 2010, Jackson also recommended to keep under review the viability of a Supplementary Legal Aid Scheme (SLAS). This is a self-funding legal fund, operated by a legal aid body, and serves as a form of civil litigation funding. Persons who do not have sufficient means to afford legal representation in their case can apply for such funding, and have to agree to pay a percentage of the recovered amounts back into the fund.<sup>501</sup> A SLAS is similar to a CLAF, the difference being that, here, the claimant is a legal aid recipient and the fund is administered by the legal aid authority. Initially, the government did seem keen on implementing a SLAS:

*At a time when the public purse is constrained, the partially self-funding SLAS represents an important innovative measure to enable legal aid funding for civil cases.*<sup>502</sup>

After having publicly consulted the proposal, the government decided to implement a SLAS. The SLAS would recoup 25% of the proceeds of a successful claim of a publicly funded claimant, which would then be diverted to (supplement) the legal aid costs of other cases. The percentage was set at this level to express the government's intent that, if possible, clients should enter into a CFA rather than apply for legal aid, and not to make the latter more attractive than entering into a CFA.<sup>503</sup> Despite the government's intention, a SLAS has yet to be implemented. According to Jackson, the idea has faded away.<sup>504</sup>

## **5.5 Relevant rules and features of the collective redress mechanisms**

### **5.5.1 Joinder, consolidation, and a test case**

A court can consolidate separate actions into one proceedings or join any number of parties to a claim (consolidation and joinder of parties).<sup>505</sup> The court can do so at the request of one of the parties or on its own motion if it deems joinder or consolidation convenient, for instance, if the claims concern common questions of law or fact.<sup>506</sup> Claimants need to be represented by the same solicitor and counsel.<sup>507</sup> If claims are consolidated or parties joined, the common issues will be jointly addressed. Both techniques do not create a formal group action, that is, the actions remain distinct and the joined parties are a full party to the proceedings. As of 2001, the GLO (which will be discussed in section 5.5.3) has streamlined the organizational and managerial issues that consolidation and joinder obviously require, particularly in the case of large numbers of (unknown) aggrieved parties.

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<sup>500</sup> Jackson 2016. See also Jackson 2011.

<sup>501</sup> Jackson 2010, p. 141. Inspired by similar schemes in Australia, Canada and Hong Kong.

<sup>502</sup> CJC UK Government, *Reform of Legal Aid in England and Wales: the Government Response*, June 2011, p. 64 ff and p. 246 ff.

<sup>503</sup> It is the same percentage as the capped CFA in personal injury cases, see also section 5.4.3.1.

<sup>504</sup> Jackson 2016, § 2.5.

<sup>505</sup> CPR 3.1(2)(g), CPR 3.1(2)(h), CPR 19.1 and CPR 19.2.

<sup>506</sup> See CPR 1.1, 1.2, 1.4(2)(i) and CPR 7.3, and Sime & French 2015, p. 244.

<sup>507</sup> Sime & French 2015, p. 244 and 283.

English courts have a traditional preference for ‘completeness in adjudication’ and ‘disposing of as many controversies at the same time as is possible’.<sup>508</sup> The main technique to do so is case management, which might be considered an even more important instrument than a formal collective redress device. Indeed, the mechanisms of consolidation and joinder have been employed in mass harm situations, also after the GLO was introduced. Illustrative examples are the Cape asbestos group action, in which approximately 3,000 personal injury claims were consolidated, and the Railtrack litigation, in which almost 48,000 shareholders joined as parties in a claim for damages at the initiative of an action committee that was set up by a number of activist shareholders.<sup>509</sup> Consolidation or joinder is deemed convenient when the different claims raise common issues of law or facts; the aim is to pool resources, create economies of scale, and avoid a multiplicity of proceedings and irreconcilable decisions.<sup>510</sup> The instruments of joinder and consolidation can be employed to obtain collective redress if the individuals can be – easily – identified. Furthermore, a party needs to initiate, build, administer and coordinate the claims. If too many such parties are involved, a GLO might be preferable compared to a joinder. For instance, in the phone hacking litigation against News of the World, the High Court expressed its disbelief about the number of law firms that were taking on the individual claims and ‘threatened’ to make a GLO so as to appoint a lead solicitor, to better streamline the claims and to control costs.<sup>511</sup> Judges might also stretch their discretionary powers too far. In 2015, the Court of Appeal ruled that a court of first instance had extended its jurisdiction. It had listed a number of ‘deprivation of liberty’ cases in order to address common issues and therewith devise a standardised and streamlined process in anticipation of a large increase in the number of such cases. However, the common issues were later held to be ‘generic academic issues without any, or any proper, identification of the particular issues’. The Court of Appeal was also critical of the legal representatives, who should have ‘properly addressed their minds as to how to structure the proceedings’, such as bringing a representative action or making a GLO.<sup>512</sup>

Despite its use in mass damage cases, the CJC concluded in 2008 that joinder and consolidation were inadequate means to effectively and efficiently obtain collective redress, as they become ‘unwieldy’ when large numbers of parties are involved.<sup>513</sup> Another important obstacle that needs to be overcome is the funding of the proceedings and the distribution of costs between the claimants. This might require complex cost-sharing agreements between the claimants and, as mentioned, can create costs disputes.<sup>514</sup> Since individual claimants remain full parties to the proceedings, individual claimants might be jointly liable for a potential adverse costs order. In the aforementioned Railtrack litigation, the claimants requested the court to order that individual claimants would be severally liable for a

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<sup>508</sup> Zuckerman 2013, p. 655. See also Senior Courts Act 1981, section 49(2).

<sup>509</sup> *Lubbe and others v. Cape* [2000] 1 WLR 1545 (HL) and *Weir v. Secretary of State for Transport* (No. 1) [2005] EWHC 812 (Ch).

<sup>510</sup> Andrews 2001, p. 257, Zuckerman 2013, p. 655 and 658.

<sup>511</sup> M. Taylor, ‘Vos J threatens phone-hacking firms with group litigation order as costs spiral’, *The Lawyer*, 19 March 2012. On the phone hacking litigation, see Andrews 2013, p. 625, and – elaborately – Higgins 2012.

<sup>512</sup> *Re X* (Court of Protection Practice) [2015] EWCA Civ 599, para. 124 ff.

<sup>513</sup> Sorabji, Napier & Musgrove 2008, p. 82 ff.

<sup>514</sup> Creutzfeldt & Hodges 2016, p. 333.

proportion of the common costs.<sup>515</sup> The defendants, however, argued that in effect such an order would make the recovery of adverse costs illusory, since the costs of individual recoveries would equal or exceed the cost to be recovered (about £ 40 per capita). The court was persuaded by this argument and denied the order, yet urging parties to devise a system under which provision would be made to meet potential adverse costs.<sup>516</sup> All claimants had initially chipped in to cover the adverse costs risk, but the expected costs had exceeded the fund. Raising such (additional) funding among members is no picnic:

*The sum so far raised was raised, over two years ago, on the basis that it was a one-off call. If a letter went out now asking for more, say, for example £25 or £30, [the claimants' counsel] says that some would pay, some would pay in full, some would perhaps not pay in full, some would debate in costly correspondence with the Committee or with the claimants' solicitors what was going on. Some would choose not to pay, some would simply not answer. A vicious circle would be created, as some chose not to contribute or failed to contribute, the burden on the remaining members would increase, which would of course increase the chance of them also deciding not to contribute.*<sup>517</sup>

This argument, however, also did not persuade the court to order a protective costs order:

*'All I know about their means is that they [the shareholders] were, at some stage, able to buy shares (or possibly in a few cases inherit shares or otherwise come by them for nothing) and that they have since been able to contribute to [the committee] as requested £20 per head, and £10 per share rateable to shareholding. I cannot, without evidence, jump from that to a conclusion that they cannot raise £900,000 between them which, as I have mentioned, though it comes out at a modest £18.77 each, even rounded up for administrative costs, it is not a large demand.'*

Requiring individuals to issue proceedings and inherent funding and costs issues can thus form an obstacle to pooling claim(ant)s. The minimal requirement is for someone to identify and coordinate the claim(ant)s. In order to make a proper return on the investment, entrepreneurial parties will only do so if the number of participating individuals and the claim value are sufficiently large. Individual participation can be problematic – low – in opt-in actions, in particular in low value claims.<sup>518</sup> The individual claimants in the cases discussed in this section were mainly represented on a conditional or contingency basis by solicitors and CMCs.<sup>519</sup> Moreover, in the phone hacking litigation, reportedly, a wealthy aggrieved party has offered to pay adverse costs whenever individual cases are unsuccessful.<sup>520</sup>

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<sup>515</sup> Similar to the rule on liability for costs in GLO proceedings; see sections 5.3.6.1 and 5.5.3.

<sup>516</sup> *Weir v. Secretary of State for Transport (No. 1)* [2005] EWHC 812 (Ch), paras 6-8 (summarizing an earlier judgment, which has not been published).

<sup>517</sup> *Weir v. Secretary of State for Transport (No. 1)* [2005] EWHC 812 (Ch), para. 34.

<sup>518</sup> See also section 5.5.6 on the low participation rate in the football t-shirt case, and *Mulheron* 2008, in particular p. 16 ff.

<sup>519</sup> See, for instance, <hamlins.co.uk/services/phone-hacking-claims>. See also the *Buncefield* case hereafter.

<sup>520</sup> *Higgins* 2012, p. 280.

Another way to pursue collective redress is by issuing a test case, or, if similar cases have already been filed, the court can order their stay and select one to be pursued as a test case. Here too, coordination is an essential requirement. An often cited example of ineffective mass dispute resolution through a test case concerns bank charges that consumers had to pay for overdrafts on their bank accounts.<sup>521</sup> The case against seven banks was brought by the OFT. It applied for a declaratory judgment that the charges infringed consumer regulation, aiming to provide the basis for settling the other claims.<sup>522</sup> The action, however, was not undertaken until after a consumer awareness campaign by Which?, aggressive advertising campaigns by claims management companies that charged relatively excessive conditional and contingency fees, and thousands of small claims already having been issued before the county courts.<sup>523</sup> A large portion of the individual proceedings (30%) were initially not stayed, until the Ministry of Justice issued a guidance document, urging county courts and claims management companies to withhold further action until the OFT test case has been settled.<sup>524</sup> In 2009, the Supreme Court rejected the OFT's claim.

In 2008, the CJC deemed the bank charges dispute resolution strategy to be manifestly inefficient, as it had created large additional costs for litigants and the court system, and was potentially unfair:

*While many bank customers did receive payments because the banks took a commercial view to pay, bank customers, like others with individual claims in a class of claimants, were left to the dangers associated with numerous individual suits i.e., the risk of inconsistent judgments; disproportionate litigation delay; disproportionate and likely exorbitant cost to the litigants and the court system as a whole; and adverse publicity for the defendants over a long period of time.*<sup>525</sup>

More generally, just as with joinder and consolidation, a test case requires coordination, and raises additional issues of limitation, selection and commonality. In addition to the legal hurdles, there are practical obstacles. Here, too, creative costs arrangements might be necessary. For instance, in a 2015 test case, the alleged wrongdoer agreed to pay the legal costs of the two opposing litigants. The case concerned residential mortgages and unsecured lending by a nationalised bank, and the result of the test case would 'almost inevitably predicate the outcome' for approximately 41,000 other parties.<sup>526</sup> Another issue that has emerged from the bank charges case was that few major law firms were willing or able to act for the consumers given the potential conflicts of interest with other clients.<sup>527</sup>

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<sup>521</sup> Office of Fair Trading v. Abbey National and others [2009] 3 WLR 1215 (SC). See Mulheron 2008, p. 121 ff, Sorabji, Napier & Musgrove 2008, p. 83, Hodges 2008, p. 65 ff, Uff 2013, p. 199, and Andrews 2014a, p. 112.

<sup>522</sup> Such a 'wider implications process' can be brought if the legal issue is novel and with significant consequences; see also section 5.5.4.

<sup>523</sup> Mulheron 2008, p. 121 ff.

<sup>524</sup> Mulheron 2008, p. 124.

<sup>525</sup> Sorabji, Napier & Musgrove 2008, p. 82; see also p. 78, 84 and 151.

<sup>526</sup> NRAM v. McAdam and another [2015] EWCA Civ 751, para. 4.

<sup>527</sup> Sorabji, Napier & Musgrove 2008, p. 82.



Nevertheless, there are also praised examples of efficient and effective judicial case management without the use of any formal device. In the Buncefield explosion case, the court decided against ordering a GLO and the actions were never formally joined. Instead, several separate case management orders were made, such as referring the cases to one court and appointing a leading law firm.<sup>528</sup> Parties were able to settle most of the approximately 3,300 cases within four years due to intensive judicial managerial control, gradually dealing with different legal questions, the involvement of highly experienced judges and lawyers on both sides, and the defendant adopting a settlement rather than litigation approach.<sup>529</sup> Most individual claimants were represented on a CFA basis.<sup>530</sup> Tzankova has observed only one drawback in this case: the lack of judicial oversight of the settlement.<sup>531</sup> Creutzfeldt and Hodges have also observed the lengthy discussions on costs between some of the claimants and the defendants, which took another couple of years and, eventually, were settled confidentially. They comment that these disputes could have been curtailed had the GLO route been adopted.<sup>532</sup>

### 5.5.2 Representative action

As discussed in section 2.2.3, a representative action can be brought under CPR 19.6, by one or more member(s) of the class that has or have the same interest as other persons. If the court allows the representative to act in this capacity, it will address the common issues at hand. The representative action is sometimes referred to as the English version of a class action, but – as will be discussed hereafter – the main distinction is that it is difficult or even impossible to claim damages on behalf of represented class members.

The representative party needs to have a cause of action in its own right.<sup>533</sup> A trade association or consumer organization will have difficulties in acting as a representative, but one or more of their members might be allowed to sue on behalf of the body.<sup>534</sup> The court decides whether or not the representative can (continue to) act in such a capacity.<sup>535</sup> According to the Lord Chancellor, it is unlikely that representatives will bring frivolous or vexatious claims; case management and the permission stage prevent this.<sup>536</sup> The represented parties are not necessarily involved in the litigation and they are not required to opt in. The action can take place without the knowledge, participation or control of the class members – all litigation decisions are made by the representative claimant(s). The judgment or order binds the class members. However, the judgment or order is only enforceable after the court's approval on a case-by-case basis in which the individual circumstances will be assessed:

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<sup>528</sup> *Colour Quest and others v. Total Downstream and others* [2009] EWHC 540 and EWHC 823 (Comm). See Creutzfeldt & Hodges 2016, Tzankova 2014, and the 2012 BEUC study 'Powers of the judge in collective redress proceedings', available at <beuc.eu/publications/2012-00227-01-e.pdf>.

<sup>529</sup> Creutzfeldt & Hodges 2016, p. 328 ff.

<sup>530</sup> Creutzfeldt & Hodges 2016, p. 333.

<sup>531</sup> Tzankova 2014, p. 344-345.

<sup>532</sup> Creutzfeldt & Hodges 2016, p. 333.

<sup>533</sup> CPR 19.6(1)(b).

<sup>534</sup> Howells 2008, p. 2, referring to *Chocosuisse Union v. Cadbury* [1999] ETMR 1020 (CA).

<sup>535</sup> CPR 19.6(2) and (3).

<sup>536</sup> Lord Chancellor's Department, *Representative Claims: Proposed New Procedures*, February 2001, para. 40.

*'It is correct that a represented person may be able to avoid a judgment being enforced against him personally, by reason of special facts or matters which are particular to his case. Such facts would include, for example, facts relating to the person's membership of the class of persons represented; or (...) facts from which it can be shown that there was an element of fraud or collusion in the original action. There would therefore have to be some special reason why the judgment could not be enforced against a particular member of the class of persons represented.'*<sup>537</sup>

A key factor in the representative action is the identity of the interest, which is determined with a view to promoting the overriding objective and due process.<sup>538</sup> As the represented persons are not required to consent to the action or to participate therein, 'the same interest requirement is designed to ensure perfect overlap between the interests of the representative parties and those who they represent.'<sup>539</sup> Due to the courts' narrow interpretation of this criterion, the scope of the representative action is limited.<sup>540</sup> The narrow interpretation was underlined in *Emerald Supplies v. British Airways*, which revolved around two flower importers who, on their own behalf and that of all direct and indirect purchasers, brought a claim for declaratory relief against British Airways (BA).<sup>541</sup> The claimants sought a declaration that BA was liable for damage caused by the air freight charges price-fixing cartel in which it took part. The claim was dismissed because it did not meet the same interest requirement. According to the Court of Appeal:

*'(...) the essential point is that the requirement of identity of interest of the members of the represented class for the proper constitution of the action means that it must be representative at every stage, not just at the end point of judgment. If represented persons are to be bound by a judgment that judgment must have been obtained in proceedings that were properly constituted as a representative action before the judgment was obtained. In this case a judgment on liability has to be obtained before it is known whether the interests of the persons whom the claimants seek to represent are the same. It cannot be right in principle that the case on liability has to be tried and decided before it can be known who is bound by the judgment. Nor can it be right that, with Micawberish optimism, Emerald can embark on and continue proceedings in the hope that in due course it may turn out that its claims are representative of persons with the same interest.'*<sup>542</sup>

The Court of Appeal emphasized that class membership can fluctuate; that it does not have to remain constant and closed throughout. However, in this case, the problem was not the fluctuating membership, but that a judgment on liability was required before being able to qualify any person as a class member. Furthermore, even if such qualification were possible, a defence might be available that

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<sup>537</sup> *Howells v. Dominion Insurance Co* [2005] E.W.H.C. 552 (QB), in which no such grounds were found to have been advanced. See also CPR 19.6(4).

<sup>538</sup> *Emerald Supplies v. British Airways* [2010] EWCA Civ 1284 (CA), para. 4, and Zuckerman 2013, p. 669-670.

<sup>539</sup> Zuckerman 2013, p. 669 and 671.

<sup>540</sup> For a critical analysis of the narrow interpretation, see Mulheron 2012, who refers to a case 'pre-CPR' with a similar setback for the flexibility of the representative action, *Markt & Co v. Knight Steamship* [1910] 2 K.B. 1021 (CA). See also Howells 2008, p. 2-3.

<sup>541</sup> *Emerald Supplies v. British Airways* [2010] EWCA Civ 1284 (CA).

<sup>542</sup> *Emerald Supplies v. British Airways* [2010] EWCA Civ 1284, para. 65.

would result in BA being held liable for the damages of some class members and not for those of others (e.g. those who had passed on the damage):

*'If there is liability to some customers and not to others they have different interests, not the same interest, in the action.'*<sup>543</sup>

Thus, at the time of commencement, the group did not have the same interest as required by CPR 19.6, and the action was declared 'fatally flawed'.

As a consequence of the narrow interpretation, it is difficult to initiate a representative action for claims for damages as, most likely, the interests of all individuals are not similar. According to some, this leaves the mechanism practically useless to obtain damages without having to bring a follow-on individual claim.<sup>544</sup> Given the obstacles, apart from declaratory and injunctive relief, representative proceedings are relatively uncommon.<sup>545</sup> According to Andrews, it has remained a 'procedural back-water rather than a flourishing style of multi-party litigation', since the 'arithmetic of individual loss must be totted and tabulated painfully and precisely.'<sup>546</sup> The procedure is most commonly used where the claims arise out of one accident or tort or the breach of one contract,<sup>547</sup> for instance, to clarify rights in relation to shares or property.<sup>548</sup> As a representative party needs to have a cause of action in its own right and/or claims for damages are difficult, it is not likely that an entrepreneurial party will engage in such action. However, it is possible to settle the common issues through a representative action, and then to have the damages assessed in individual litigation.<sup>549</sup> Also, in exceptional circumstances, liability and damages can be calculated in the first stage, or the damages can be awarded to the representative if the class members agree to this, for instance, for the compensation to be used for its war chest to fund a future action.<sup>550</sup> In 2014, Andrews observed an increasingly flexible approach towards representative actions and claiming compensation if, at the time of the judgment, the court can determine i) the total amount of damages and ii) the value of individual claims for damages.<sup>551</sup> A representative action might also serve to test whether a potential mass damage claim has a realistic prospect of success.<sup>552</sup>

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<sup>543</sup> Emerald Supplies v. British Airways [2010] EWCA Civ 1284, para. 64.

<sup>544</sup> See Andrews 2001, p. 253-255, who lists some exemptions from this two-stage approach. See also Howells 2008, p. 27-30.

<sup>545</sup> Andrews 2014a, p. 113-115.

<sup>546</sup> Andrews 2001, p. 253.

<sup>547</sup> See Brown & Dodds-Smith 2012, under 1.1.

<sup>548</sup> Howells 2008, p. 2-3.

<sup>549</sup> Prudential Assurance v. Newman Industries [1980] 2 WLR 339 (Ch).

<sup>550</sup> Andrews 2001, p. 254, with reference to Morrison Steamship v. Owners of Cargo SS Greystoke Castle [H.L. 1947] All E.R. 696 and EMI Records v. Riley [Ch. 1981] WLR 923. See also Howells 2008, p. 3.

<sup>551</sup> Andrews 2014a, p. 116, referring to Millharbour Management and others v. Weston Homes and another [2011] EWHC 661 (TCC).

<sup>552</sup> See, for instance, Fitzpatrick and another v. AIB Group [2015] WL 4635359 (HC), where the defendant successfully sought an application to strike out a claim or for a summary judgment.

If a case is settled after a representative action, normally the court does not monitor or approve the settlement. If a representative has settled a case under disadvantageous terms, represented parties might be able to invoke the court's inherent jurisdiction.<sup>553</sup>

Normally, the representative party is liable for adverse costs. However, the court might grant permission to enforce the costs order – also – against the represented parties, and also in light of the beneficial object of the representative action: to avoid unnecessary joinder of parties and enable efficient litigation.<sup>554</sup> In representative actions, too, defendants might have such a strong need for closure that they are willing to fund the action.<sup>555</sup>

### 5.5.3 Group litigation order

The practice of courts to group claims into one if they address common or related issues of fact or law provided the basis for the design of the GLO regulation. As a result of the Court of Appeal's call for legislative action in *Nash v. Eli Lilly*,<sup>556</sup> and Lord Woolf's recommendations, a legislative structure based on this practice was implemented in 2000.<sup>557</sup>

At the request of one of the parties or at a court's own initiative, a group litigation order (GLO) enables courts to manage 'a number of' similar claims and by considering common issues collectively or in (a) test case(s).<sup>558</sup> The procedure can be summarized as follows.<sup>559</sup> After various preliminary steps, an application for a GLO can be made. If the required conditions are met and a court sets out to order a GLO, a senior judge at the court in question needs to approve the intended GLO. Pursuant to the superiority criterion, a court will not order a GLO if a representative action or joinder is more appropriate to resolve the mass dispute.<sup>560</sup> Relevant in this respect is the fact that litigation under the GLO has to meet the overriding objective of CPR 1.1 (justly and at proportionate cost). In the GLO order, the court where the application was made specifies the issues that are subject to the GLO and the criteria for entry on the group register.<sup>561</sup> The court also appoints a managing court, which is responsible for overall control over the case and hearing the generic GLO issues.<sup>562</sup> Usually, this is the High Court in London.<sup>563</sup> This is said to have the advantage that GLO expertise remains with experienced judges.<sup>564</sup> The managing court manages the claims on the group register, and other judges, for instance, a costs judge,

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<sup>553</sup> Andrews 2001, p. 252. On the court's inherent jurisdiction in general, see Sime & French 2015, p. 42. See also Andrews 2014a, p. 113-114.

<sup>554</sup> Chandra v. Mayor [2016] EWHC 2636 (Ch), para. 10. See CPR 19.6(4). See also section 5.3.6.1.

<sup>555</sup> Andrews 2014a, p. 114, referring to *Equitable Life Assurance Society v. Hyman* [2000] 3 WLR 529.

<sup>556</sup> *Nash v. Eli Lilly* [1993] 1 W.L.R. 782 (CA).

<sup>557</sup> CPR 19 Part III (CPR 19.10 - 19.15) and PD 19B.

<sup>558</sup> CPR 19.10 and 19.11(1), PD 19B, paras 3.1 and 4.

<sup>559</sup> See, more detailed, Andrews 2001; Zuckerman 2013, p. 676 ff, Howells 2008, and Brown & Dodds-Smith 2012.

<sup>560</sup> Mulheron 2009, p. 15. See, for instance, *Hobson & Others v. Ashton Morton Slack Solicitors & Others* [2006] EWHC 1134 (QB).

<sup>561</sup> CPR 19.11 (2).

<sup>562</sup> CPR 19.11 (2)(c) and PD 19B para. 8.

<sup>563</sup> Howells 2008, p. 3.

<sup>564</sup> Hodges 2009a, p. 112.

may be appointed as well.<sup>565</sup> The managing court establishes a register where all claims that give rise to the issues under the GLO are registered. The claims that fall under the order, pending as well as new claims, are entered on the register – by the claimant itself or by the court – and transferred to the managing court.<sup>566</sup> The order will also provide directions as to the publication of the order, usually in the form of an advertisement, so that future claimants are aware of the GLO.<sup>567</sup> During litigation, there are periodic case management conferences, where the managing court may give directions, for instance, which claim(s) will proceed as test or lead cases or the appointment of a lead solicitor.<sup>568</sup> At the trial stage, the court selects one or more lead cases which are typical for the group. The decision in these cases subsequently forms the basis for the settlement of the other disputes.<sup>569</sup> It is possible to obtain damages through a GLO.

The main difference with the representative action is that parties have to opt in after the managing court has set up a register.<sup>570</sup> A party may also apply to be removed from the register.<sup>571</sup> The court order is binding for the parties that are registered at the time of the decision, unless the court orders otherwise.<sup>572</sup> Individuals can also opt out by applying to the court to be not bound by the decision.<sup>573</sup>

Publicity by solicitors regarding potential group actions has to meet the standards of the Solicitors Code of Conduct 2011.<sup>574</sup> A solicitor that represents a party that wishes to apply for a GLO needs to consult with the Law Society's Multi-Party Action Information Service as to whether other cases might give rise to such action. If there are more interested solicitors, the management court can appoint a lead solicitor to run both the application and the eventual case.<sup>575</sup> Competition between solicitors might give rise to disputes over the selection and appointment.<sup>576</sup> More than one lead solicitor might be appointed if the group is divided into cohorts. Their responsibilities might be both joint and several:

*'[They are] jointly responsible for the management and co-ordination of the Claimants' actions. They shall have conduct of all investigations, applications and proceedings in respect of the common issues and preparation for and trial of any test cases relating to the common issues subsequently ordered by the court. [Name of one of the lead solicitors] shall be responsible for the group register.'*<sup>577</sup>

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<sup>565</sup> PD 19B para. 8.

<sup>566</sup> CPR 19.11(2)(a), 19.11 (3)(a)(i and iii), (3)(b), 19.13(f).

<sup>567</sup> CPR 19.11(3)(c). See also Brown & Dodds-Smith 2012, p. 80.

<sup>568</sup> CPR 19.13. See also Hodges 2009a, p. 109.

<sup>569</sup> Brown & Dodds-Smith 2012, p. 79.

<sup>570</sup> Andrews 2001, p. 260.

<sup>571</sup> CPR 19.14.

<sup>572</sup> CPR 19.12(1).

<sup>573</sup> CPR 19.12(3).

<sup>574</sup> See section 5.2.2.

<sup>575</sup> CPR 19.13(c) and PD 19B paras 2.1 and 2.2. See also Andrews 2001, p. 258-259.

<sup>576</sup> See *Hutson and others v. Tata Steel UK* [2017] EWHC 2647. See also <[litigationfutures.com/news/exclusive-law-firms-face-off-high-court-lead-solicitor-role-vw-group-action](http://litigationfutures.com/news/exclusive-law-firms-face-off-high-court-lead-solicitor-role-vw-group-action)> on the apparent battle between the law firms Harcus Sinclair and Your Lawyers, both aiming to be appointed as lead solicitor in the Volkswagen case.

<sup>577</sup> *Hutson and others v. Tata Steel UK* [2017] EWHC 2647, para. 6.

An application to add a lead solicitor is nevertheless approached cautiously:

*'In addition to the potential for increased costs, the duplication of effort is also likely to increase the risk of delays, misunderstandings and disagreements relating to the management of the claims. Based on the history of [the applicant's] involvement to date, I am satisfied that such risks are not merely theoretical.'*<sup>578</sup>

The number of claimants that are or might be eligible to join the group, as 'scouted' by the solicitor, might play a role in the selection, but not an essential one:

*'[T]he selection of lead solicitors is not an exercise in proportional representation. Having a considerable number of individual eligible claimants may well give rise to an enhanced claim to the role of lead solicitor but it is a factor which falls far short of amounting to an entitlement. In this regard, each case must be judged on its own merits.'*<sup>579</sup>

Since its implementation, the GLO has been identified as the main mechanism to address mass damage claims.<sup>580</sup> All current and settled GLO cases are listed.<sup>581</sup> To date, 100 cases have been listed. This amounts to approximately 6 GLOs per year. The cases cover a wide variety of claims such as personal injury, product liability, holiday disasters, taxes, financial products or services, securities, and environmental claims.<sup>582</sup>

The mechanism has been criticised as well. Mulheron has observed that the GLO is just a 'permissive joinder device'.<sup>583</sup> In 2008, she identified relatively low opt-in rates and procedural problems, such as the need to identify claimants and costs, concluding that there is an unmet need for alternative collective redress mechanisms. In a study on judicial case management, Tzankova quotes two English practitioners that have stated that 'cases get really messed up as soon as judges start using the GLO.' She infers from a BEUC study on the power of judges in collective redress that English courts often use case management techniques rather than make a group litigation order.<sup>584</sup> Oddly enough, this observation goes against the original reason behind creating the GLO regulation, as a series of mass damage events in the 1980s and 1990s gave rise to the conclusion that courts were not able to adequately deal with multiparty cases.<sup>585</sup> This idiosyncrasy can probably be explained by the fact that, at that time, English case management techniques were not as developed and mainstream as they are nowadays. Unfortunately, the published case law in the Buncefield litigation, in which making a GLO was considered, does not mention the reason for rejecting the application and relying on 'regular' case management techniques instead.<sup>586</sup> Another, more specific, problem is observed by Higgins. He notes that

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<sup>578</sup> Hutson and others v. Tata Steel UK [2017] EWHC 2647, para. 12.

<sup>579</sup> Hutson and others v. Tata Steel UK [2017] EWHC 2647, para. 21.

<sup>580</sup> Andrews 2001, p. 249, Andrews 2013, p. 620, and Andrews 2014a, p. 111.

<sup>581</sup> See <gov.uk/guidance/group-litigation-orders>.

<sup>582</sup> See Mulheron 20098, and Brown & Dodds-Smith 2012, p. 80.

<sup>583</sup> Mulheron 2004a and Mulheron 2008.

<sup>584</sup> Tzankova 2014, p. 346.

<sup>585</sup> See section 2.2.3.

<sup>586</sup> On the case, see also section 5.5.1.

GLO proceedings are not suitable for low value claims, due to its opt-in design. He states that the requirement of filing individual forms and having to pay court charges creates prohibitively high transaction costs.<sup>587</sup> The lack of judicial overview on settlements after GLO proceedings has been detected as another important lacuna.<sup>588</sup> Many cases are settled after the common issues have been addressed. An example is the Corby group litigation, which concerned the mothers of the claimants being exposed to toxic materials during their pregnancy, causing birth defects to 18 children. The claimants litigated upon a CFA basis, with a 100% mark-up success fee, and ATE insurance. In 2009, the local authority was held liable; causation and quantum would have to be established in individual proceedings. The claimants' costs for the group litigation (£ 4 million) were subject to an interim costs judgment. As the costs, in particular the recovery of the CFA success fee and the ATE premium, would be subject to a detailed assessment before a costs judge, the court reduced the preliminary costs award. However, the cases were settled through mediation in April 2010.<sup>589</sup> Details of the settlement were not disclosed, such as what proportion of the total payment (£ 14.6 million) related to costs. Obviously, this is the parties' prerogative and since it is an opt-in settlement, risks might be mitigated and/or merely theoretical. However, given the court's earlier critical observations on the claimants' solicitor and ATE insurer, and its description of the financial situation of the claimants ('of modest means'),<sup>590</sup> some judicial overview on the reasonableness of the settlement and the agreed costs award might indeed have been desirable to rule out any potential conflict of interests between the claimants and their representatives and insurers.<sup>591</sup>

Most of the discussed GLO cases have been litigated on the basis of CFAs and ATE insurances. They fall under the 'old' regime of the potential recoverability of the CFA success fee and ATE premium.<sup>592</sup> It can only be predicted to what extent GLO proceedings are affected by the reversal of the recoverability of those 'additional liabilities' in 2013. On the situation by the end of the 1990s, when recoverability also did not exist, Lee & Stech state that without ATE insurance, the possibility of funding multi-party claims through CFA structures 'was largely thought dead', following the failed attempt to sue tobacco companies that almost bankrupted the leading solicitors.<sup>593</sup> The rise of third-party litigation funding in the field of mass litigation might suggest that there is an increasing need for alternative types of litigation funding. Indeed, in the Volkswagen case, a law firm that has applied for a GLO is operating on a damages-based agreement and has secured third-party litigation funding.<sup>594</sup> A competing firm states

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<sup>587</sup> Higgins 2012, p. 282.

<sup>588</sup> 2012 BEUC study 'Powers of the judge in collective redress proceedings', available at <[beuc.eu/publications/2012-00227-01-e.pdf](http://beuc.eu/publications/2012-00227-01-e.pdf)>, p. 163 and 166.

<sup>589</sup> See, for instance, <[publiclawtoday.co.uk/local-government/litigation/311-litigation-articles/2350-corby-toxic-contamination-compensation-bill-set-at-p146m](http://publiclawtoday.co.uk/local-government/litigation/311-litigation-articles/2350-corby-toxic-contamination-compensation-bill-set-at-p146m)>.

<sup>590</sup> Corby Group Litigation v. Corby District Council [2009] EWHC 2109 (TCC), paras 26 ff, 35 and 44.

<sup>591</sup> See also section 5.5.7.

<sup>592</sup> See section 5.3.5.2.

<sup>593</sup> Lee & Stech 2011, p. 141.

<sup>594</sup> Harcus Sinclair; see <[vwemissionsaction.com/news/press-release-harcus-sinclair-takes-the-legal-case-against-vw](http://vwemissionsaction.com/news/press-release-harcus-sinclair-takes-the-legal-case-against-vw)>. The GLO application has been adjourned until October 2017.

that it is operating under ‘no win, no fee’ agreements, but has not (yet) disclosed more specific information.<sup>595</sup>

An element of GLO litigation that might be attractive to entrepreneurial parties is costs capping, as it makes litigation costs (risks) more predictable. In group litigation, costs capping is ‘common or at least not uncommon’.<sup>596</sup>

#### 5.5.4 Assignment model

As discussed in section 5.4.6, collective redress can also be obtained by way of the so-called assignment model. This opt-in mechanism has been created in practice. A special purpose vehicle purchases the (cause of action of the) claims of aggrieved parties and by way of joinder enforces them in its own name and on its own account and risk.<sup>597</sup> In some EU member states, this model has been used to bundle the claims from a multitude of SMEs. In practice, the following practical advantages have been mentioned: the victim takes the deliberate and verifiable decision to sell its claim, by selling their claim SMEs do not compromise their ongoing business relationship with the wrongdoers, the bundling creates synergies (economies of scale and a strengthened negotiation position on the victims’ side), the litigation vehicle is a specialised repeat player, it carefully selects, manages and assesses claims and only pursues meritorious claims, it centralizes the substantiation of claims and is able to quantify damage on a market-wide basis, it provides access to justice for SMEs that might otherwise not pursue their claim given their lack of financial resources, it creates interesting incentives and opportunities for external third-party litigation funders or investors (an attractive expected return on the investment), and the allocation of proceeds is easy as the victims and their share in the damages are identifiable.<sup>598</sup>

This construction has been applied not only to fund a case, but also to bundle claims and bring them collectively. As mentioned, the method does not seem to have got off the ground in England and Wales.<sup>599</sup> As far as I have been able to ascertain, to date, no such cases have been brought before the English courts in competition law cases. In spite of the continuing relaxation of the doctrines of champerty and maintenance, it is questionable whether the model will gain ground in England and Wales, for the reasons discussed in section 5.4.6.

However, the model was recently successfully tested in a consumer law mass damage case.<sup>600</sup> The case revolved around Casehub, a company that aggregates small value consumer claims into a group action by way of claim purchase agreements through which the claim for recovery is assigned to Casehub.<sup>601</sup> For Casehub to actually pursue the claims, the value of the aggregated claims needs to

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<sup>595</sup> Your Lawyers; see <yourlawyers.co.uk/> and <caremissionslawyers.co.uk/>.

<sup>596</sup> *Multiple claimants v. Corby Borough Council* [2008] EWHC 619 (TCC), para. 9. On costs capping, see also section 5.3.2.4.

<sup>597</sup> See also section 5.5.1.

<sup>598</sup> CDC Cartel Damage Claims, Comments on the UK Government’s Proposals on Private Actions in Competition Law: A Consultation on Options for Reform, Brussels, July 2012, p. 9; Schreiber & Seegers 2015. See also section 3.3.

<sup>599</sup> Hodges, Peysner & Nurse 2012, p. 84-85, Sorabji 2014a, p. 13-14. See also section 5.4.6.

<sup>600</sup> *Casehub v. Wolf Cola* [2017] EWHC 1169 (Ch).

<sup>601</sup> See also <legalgeek.co/startup-map/casehub/>.



reach a certain threshold. Pursuant to the agreements, Casehub has either i) paid consumers a fixed amount (£ 40), or ii) will pay 60% of the sum recovered from the defendant. The latter payment is thus contingent upon a successful outcome. The consumers' claims concerned an alleged unlawful cancellation fee for terminating a cloud storage subscription. The defendant argued, inter alia, that the assignments were void as they assign a bare cause of action and thus are champertous and the percentage taken from the proceeds is too high. The court held that the assignments were valid and did not infringe public policy. For one thing, the claimant had a legitimate and genuine interest and the circumstances under which the assignments had been made were reasonable. The integrity of the legal process was not impugned. Such integrity involves equality before the law as part of the overriding objective. According to the court, the claimant enabled efficient and effective access to justice, in particular given the small value of the claims, the lack of any alternative means for the consumers to pursue their claim, and the lack of evidence that the proceedings impose an unacceptable burden on the defendant. Furthermore, as the sums in dispute are quantified, there is no risk of damages being inflated or otherwise abusive behaviour that infringes the 'purity of justice'.<sup>602</sup> On the assignability, the court ruled that the consumers had fully assigned their claims and the claimant was 'merely' liable to pay back, in the case of success, 60% of the proceeds:

*'[U]nder the claim purchase agreements the claimant acquired the right to the sum in question and the assignment of the right to bring a restitutionary claim to recover the sum is incidental and subsidiary to that right properly and is not a bare cause of action. The fact that liability to repay the sum is disputed does not affect its assignability.'*<sup>603</sup>

The judgment clearly demonstrates a further shift of public policy towards accepting new forms of entrepreneurial mass litigation that enable access to justice, at least in low value claims which otherwise are not likely to be pursued. Still, it depends a great deal on the particular circumstances of the case. If, for instance, the entrepreneurial party takes too large a percentage from the proceeds, the circumstances might not reasonably warrant the assignment.<sup>604</sup>

#### **5.5.5 Consumer law: an enforcement order and enhanced consumer measures**

As discussed in section 2.2.3, the Enterprise Act 2002 has currently given three types of public and private consumer law enforcers the authority to apply for an enforcement order in the interest of consumers if consumer law has been infringed.<sup>605</sup> For many years, an enforcement order could only provide for injunctive relief. The procedure was not often used, for reasons of complexity, costs and the risks to enforcers as opposed to the limitation in what it could achieve (to ensure compliance).<sup>606</sup> As of the introduction of the CRA, public enforcers and the civil courts can attach Enhanced Consumer

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<sup>602</sup> For a detailed list of such behaviour, see para. 28.

<sup>603</sup> Casehub v. Wolf Cola [2017] EWHC 1169 (Ch), para. 25.

<sup>604</sup> Trendtex Trading Corp v. Credit Suisse [1980] QB 629 (CA), p. 657: "If the assignee takes three-quarters of the damages, the circumstances may not be such as to warrant the assignment".

<sup>605</sup> The Enterprise Act 2002 followed the UK Stop Now Orders Regulations 2001 that had implemented the Injunctions Directive 98/27/EC, and has been amended by the Consumer Rights Act (CRA) in 2015.

<sup>606</sup> See Cartwright 2016, p. 277-279, with further references.

Measures (ECMs) to the order, including compensation or similar redress.<sup>607</sup> Such a measure is only attached where it is considered just and reasonable to do so,<sup>608</sup> and normally only a public body can apply for it. However, private bodies can be given this authority if they meet certain criteria – see hereafter.<sup>609</sup>

General, designated and community enforcers can make an application for an enforcement order under the coordination of the Competition and Markets Authority (CMA, previously the Office of Fair Trading, OFT). Unless urgent action is required, the enforcer needs to consult with the business at hand, and with the CMA (if the CMA is not the enforcer) before making the application.<sup>610</sup> There is a consultation period of 14 or 28 days before the action can be undertaken. As general enforcers, the CMA and local weights and measures authorities (public bodies) can make such an application.<sup>611</sup> A community enforcer, which is a body enlisted pursuant to section 4.3 of the Injunctions Directive, can do so as well.<sup>612</sup> A designated public or private enforcer can also do this, but first needs to be authorised as such by the Secretary of State.<sup>613</sup> Currently, only Which? is a private designated enforcer.<sup>614</sup> In addition, as of 2015, a private designated enforcer can obtain the status of being ‘specified’, so that it can seek an ECM (e.g. compensation). In order to achieve this status, the enforcer needs to meet certain conditions, such as that the measures cannot directly benefit the enforcer. The measures do so, for instance, if the enforcer requires a person to pay money, or if the measure gives the enforcer a commercial advantage over any of its competitors.<sup>615</sup> The Secretary of State may set out such conditions *only* if it will result in better redress for or information to consumers and more compliance by businesses.<sup>616</sup> Furthermore, the Secretary of State can only specify the private enforcer if the latter follows certain principles on transparency, accountability, proportionality, consistency and targeting cases that need action.<sup>617</sup> Finally, private enforcers must act consistently with advice or guidance given by a primary authority.<sup>618</sup>

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<sup>607</sup> Enterprise Act, section 215 and 219A(2)(a). The Consumer Rights Act 2015 addresses infringements of consumer law. For instance, it has revoked and replaced the Unfair Terms in Consumer Contracts Regulation 1999, which had implemented the 1993 Directive on Unfair Terms in Consumer Contracts (93/13/EEC) in the UK. Other measures that can be attached to the order are terminating contracts and compliance and information measures.

<sup>608</sup> Enterprise Act, section 219B.

<sup>609</sup> Enterprise Act, section 219C.

<sup>610</sup> Enterprise Act, section 214.

<sup>611</sup> Enterprise Act, sections 213(1). See the Enterprise and Regulatory Reform Act 2013 (Competition) (Consequential, Transitional and Saving Provisions) Order 2014, SI 2014/892.

<sup>612</sup> Enterprise Act 213(5).

<sup>613</sup> Enterprise Act, section 213(4).

<sup>614</sup> See BIS, *Consumer Rights Act. Explanatory Notes*, p. 66, and BIS, *Enhanced consumer measures. Guidance for enforcers of consumer law*, p. 9.

<sup>615</sup> Enterprise Act, section 219C(4) and (5).

<sup>616</sup> See Enterprise Act, section 219C(3) and (6).

<sup>617</sup> Enterprise Act, section 219C(7). The principles concern those of good regulation in the Regulators Code and section 21 of the Legislative and Regulatory Reform Act 2006.

<sup>618</sup> Enterprise Act, section 219C(9) and (10).

The measures in the redress category include offering compensation or other redress to consumers who have suffered a loss as a result of the conduct which gave rise to the enforcement order. Where such consumers cannot be identified or not without disproportionate cost, the measures must be intended to be in the collective interests of consumers.<sup>619</sup> An example of a measure in the collective interests of consumers is requiring the wrongdoer to pay the equivalent of the loss suffered to a consumer charity.<sup>620</sup> The amount of the loss suffered is irrelevant; the measure can concern both scattered and substantial losses. However, the measure needs to be proportionate to the breach.<sup>621</sup> For instance, in the case of scattered loss, it might be disproportionate to demand that the trader contacts all those who may have suffered a loss. Consumers have the right to refuse an offer of redress.<sup>622</sup> Both the enforcer and the wrongdoer can come up with a creative but appropriate solution to the breach.<sup>623</sup> An ECM will only be attached if it is just, reasonable and proportionate.<sup>624</sup> The legislation on ECMs does not contain many details. According to the government, this has been done in order to give complete flexibility to courts, enforcers and wrongdoers to identify the most suitable measure(s).<sup>625</sup>

As far as I have been able to ascertain, as yet, no civil court has attached an enhanced consumer measure to its order.

#### **5.5.6 Competition law: collective proceedings**

As discussed in section 2.2.3, with the Consumer Rights Act 2015 (CRA) a mix of instruments was introduced to improve the private actions regime in competition law. The jurisdiction of the Competition Appeal Tribunal (CAT) as a venue for competition actions was extended, as well as the remedy that can be sought. Individuals can now bring a claim for damages, any other claim for a sum of money, or seek injunctive relief if they have been harmed after a specified infringement of competition law.<sup>626</sup> Such individual action will probably concern a substantial loss, for which the parties harmed can obtain 'real redress', possibly in a (more expeditious and less costly) fast-track procedure.<sup>627</sup> The most controversial innovation, however, has been the introduction of an opt-out collective action and an opt-out collective settlement regulation (the latter will be discussed in section 5.5.7).<sup>628</sup> Both mechanisms have been designed after the emergence of third-party litigation funding and address this type of entrepreneurial party, as well as entrepreneurial lawyers and special purpose vehicles. It is therefore of particular interest for entrepreneurial mass litigation.

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<sup>619</sup> Enterprise Act, section 219A(2)(a) and (c).

<sup>620</sup> BIS, *Enhanced consumer measures. Guidance for enforcers of consumer law*, May 2015, p. 19.

<sup>621</sup> BIS, *Enhanced consumer measures. Guidance for enforcers of consumer law*, May 2015, p. 14.

<sup>622</sup> BIS, *Consumer Rights Act. Explanatory Notes*, p. 68.

<sup>623</sup> Cartwright 2016, p. 282.

<sup>624</sup> Enterprise Act, section 219B(1) to (3).

<sup>625</sup> BIS, *Consumer Rights Act. Explanatory Notes*, p. 65.

<sup>626</sup> Competition Act 1998, section 47A, as implemented together with the Enterprise Act 2002 and amended by the Consumer Rights Act 2015.

<sup>627</sup> See DTI, *A World Class Competition Regime (White Paper)*, July 2001, Chapter 8, and Enterprise Act 2002, section 15A, as implemented with the Consumer Rights Act 2015.

<sup>628</sup> Consumer Rights Act 2015, section 81 and Schedule 8 amend sections 47A and 47B of the Competition Act 1998, as implemented with the Enterprise Act 2002, sections 18 and 19. See also UK Government Response to BIS Consultation 2013, no. 3.18, p. 3, p. 12, p. 30.

Before 2015, a specified body could bring an opt-in action for damages before the CAT on behalf of at least two victims of anticompetitive behaviour.<sup>629</sup> The specified body had to be approved by the Secretary of State in accordance with published criteria.<sup>630</sup> Which? was the only specified body.<sup>631</sup> The action could only be brought with the consent of the individuals concerned, which was considered to be a major disadvantage.<sup>632</sup> This might explain why between 2002 and 2015, the Consumers' Association (Which?) only brought one case under CA 47B, which was not very successful. The notorious football t-shirts case concerned replicas of football shirts, following a decision by the OFT that some sports-wear retailers had entered into price-fixing agreements. The consumer body sought damages from the defendant on behalf of approximately 130 consumers, a 0.3% opt-in rate.<sup>633</sup> This instrument's lack of effectiveness was one of the reasons why, after a long debate, the Competition Act (CA) extended so as to include collective proceedings that – upon the CAT's discretion – use either the opt-in or opt-out technique.<sup>634</sup> The CAT's choice of technique depends on the strength of the claims and the practicality of bringing opt-in proceedings.<sup>635</sup> The CAT has exclusive jurisdiction over these proceedings.

Whereas the opt-in action requires the consent of class members, in the opt-out proceedings they are automatically included, unless they opt out according to the (case-by-case) instructions of the CAT.<sup>636</sup> The opt-out option only applies to UK-domiciled class members. Non-UK residents can opt in to the proceedings. Collective proceedings can be initiated by a private body with 'a genuine interest' in the case, on behalf of individuals and/or businesses. According to the government, organizations such as trade or consumer associations (rather than only Which?) or those who have themselves suffered loss can be considered to have such a genuine interest.<sup>637</sup> Thus, contrary to the representative action pursuant to CPR 19.6, the collective proceedings do not necessarily require the representative to have an own interest. Contrary to the private enforcer that might be specified to bring an enforcement order with enhanced consumer measures, the representative in collective proceedings does not need to be designated in advance. Instead, the CAT assesses the representative's suitability on an ad hoc basis at the certification stage.<sup>638</sup>

The collective proceedings have to concern claims that raise the same, similar or related issues of fact or law.<sup>639</sup> The claim can be for damages, a sum of money, or for injunctive relief. The action can either

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<sup>629</sup> See also Department of Trade and Industry, *A World Class Competition Regime (White Paper)*, July 2001, consideration 8.17 ff.

<sup>630</sup> CA 1998, section 47B(9) and (10) (old).

<sup>631</sup> See the Specified Body (Consumer Claims) Order 2005.

<sup>632</sup> CA 1998, section 47B(3) (old). See also Hodges 2009a, p. 108.

<sup>633</sup> See *Consumers' Association v. JJB Sports Plc* [2009] CAT 2. See Howells 2008, Hodges 2008, Hodges 2009a, p. 108, and Hodges 2009b, p. 49.

<sup>634</sup> CA 1998, section 47B(10) and (11). See also Competition Appeal Tribunal Rules 2015, rule 79(3), and *Gibson v. Pride Mobility Products* [2017] CAT 9, paras 123-124.

<sup>635</sup> Competition Appeal Tribunal Guide to Proceedings 2015, p. 76.

<sup>636</sup> CA 1998, section 47B(11)(a) and (14).

<sup>637</sup> BIS, *Private Actions in Competition Law: A consultation on options for reform - Government response*, 2013, p. 34.

<sup>638</sup> CA 1998, section 47B(5) and (8). See also the Enterprise Act, Explanatory Notes, note 67.

<sup>639</sup> CA 1998, section 47B(6).

follow a decision from the CMA or EC that competition law has been infringed (a follow-on action), or a stand-alone action.<sup>640</sup> Any unclaimed damages must be paid to charity (the Access to Justice Foundation), unless the CAT orders them to be paid to the representative instead in respect of (part of) the litigation costs or expenses in connection with the proceedings.<sup>641</sup>

There are few limitations for entrepreneurial parties to be engaged in collective proceedings. Originally, the government stated that a 'genuine interest' should be interpreted in such a way that private parties such as legal firms, third-party funders, and special purpose vehicles are excluded from bringing collective proceedings. This was intended to prevent abusive litigation, conflicts of interest and creating or cultivating a compensation culture.<sup>642</sup> However, this strict and explicit exclusion seems to have been abandoned at a later stage. The only legislative provision that refers to entrepreneurial parties is the one that bans lawyers from operating under a damages-based agreement in *opt-out* collective proceedings.<sup>643</sup> This ban is aimed at avoiding a 'litigation culture' and speculative litigation, which would place 'unjustified costs on defendant businesses' and create 'an incentive for lawyers to focus only on the largest cases'.<sup>644</sup> Thus, special purpose vehicles and third-party funders are not excluded from being engaged in collective proceedings, as will be observed hereafter.

Pursuant to the amended Enterprise Act, the CAT can issue additional rules.<sup>645</sup> It has done so in the form of the Competition Appeal Tribunal Rules 2015.<sup>646</sup> These rules include additional rules on the authorisation of the class representative (rules 78 and 85), costs (rules 98 and 104), and funding arrangements (rule 113).

The additional certification requirements for being authorised as a class representative include its 'financial wherewithal'.<sup>647</sup> The applicant is required to show that it will be able to pay the defendant's recoverable costs if ordered to do so.<sup>648</sup> Furthermore, upon a request by the CAT, it should give an estimate and details of the arrangements as to costs, fees or disbursements.<sup>649</sup> This prevents abusive behaviour such as selecting 'a person of straw'. According to Mulheron it might also diminish the need

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<sup>640</sup> The CMA or the European Commission must first have made a decision establishing that one of the relevant prohibitions has been infringed, and any appeal from such decision has been finally determined.

<sup>641</sup> CA 1998, section 47C (5)-(7). See also BIS, *Private actions in competition law – government response*, p. 27 ff.

<sup>642</sup> BIS, *Private actions in competition law: A consultation on options for reform – Government response*, 2013, p. 30-34. See also UK Response (European Scrutiny Committee) to the EC Recommendation and Communication, 4 September 2013, under 7.12 and 7.16.

<sup>643</sup> CA 1998, section 47C(8) and (9)(c) in conjunction with CLSA 1990, section 58AA(3). See also section 5.4.3.2. The restriction does not apply to *opt-in* proceedings. See also Competition Appeal Tribunal Guide to Proceedings 2015, p. 82.

<sup>644</sup> BIS, *Private actions in competition law: A consultation on options for reform – Government response*, 2013, p. 27 ff and 41. See, critically, Mulheron 2014a, p. 118 ff.

<sup>645</sup> Enterprise Act 2002, Schedule 4, paras 15B(1) and 15C(1), as implemented with the CRA 2015, section 31.

<sup>646</sup> SI 2015/1648.

<sup>647</sup> Mulheron 2015, p. 315-316.

<sup>648</sup> Competition Appeal Tribunal Rules 2015, rule 78(2)(d).

<sup>649</sup> Competition Appeal Tribunal Rules 2015, rule 78(3)(c)(iii).

to provide security for costs.<sup>650</sup> She also observes that although the EU Recommendation states that a claimant should declare to the court at the outset of the proceedings the origins of the funds that it is going to use, the collective proceedings regulation does not include a provision on the notification or disclosure of the litigation funding agreement or of assistance by a litigation funder.<sup>651</sup>

If the class representative no longer satisfies the requirements to act as such, the CAT can order its removal or withdrawal. It can do so ex officio or upon an application by the class representative, a represented person or defendant.<sup>652</sup> The CAT also has to assess the suitability of the proposed class representative's lawyers, given the 'inevitable complexity of collective proceedings'.<sup>653</sup> Furthermore, it will be critical of any pre-existing body that seeks to carry out the role of a class representative, such as a consumers' organisation, a trade association, a law firm, a third-party funder or a special purpose vehicle:

*'While there is no blanket prohibition against certain types of organisation taking on the role of class representative, the Tribunal will closely consider the nature of that body, its motivations for being involved and, crucially, whether there is an actual or potential conflict between that body and the interests of the class members. The potential conflict between the interests of a law firm or third party funder and the interests of the class member may mean that such a body is unsuitable to act as a class representative. Where the proposed class representative is a SPV, the Tribunal will expect to be given details of the constitution and management of the SPV and the reason why it was established. The Tribunal will consider each application in its individual circumstances and proposed class representatives should be prepared to explain why they are suitable to carry out that role. As in the case of class members seeking to act as the class representative, the Tribunal will also consider the body's ability to manage the proceedings and instruct its lawyers.'*<sup>654</sup>

In proceedings before the CAT, costs 'may be awarded'. The CAT has a discretionary power to do so at any stage of the proceedings, and the rules are similar to the relevant CPR provisions.<sup>655</sup> An adverse costs order will normally be awarded to or against the (sub-)class representative.<sup>656</sup> In general, the other represented persons or class members cannot be held liable for adverse costs, unless individual issues have been determined. In such a case, the associated costs can be awarded against the relevant individual person.<sup>657</sup> The CAT can assess the costs, but in complex cases it might refer the case to the SCCO for detailed assessment.<sup>658</sup>

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<sup>650</sup> Mulheron 2015, p. 316-317.

<sup>651</sup> Recommendation 2013/396/EU, section 14. See also Mulheron 2015, p. 312.

<sup>652</sup> Competition Appeal Tribunal Rules 2015, rules 85(1)-(3) and 87.

<sup>653</sup> Competition Appeal Tribunal Guide to Proceedings 2015, p. 72.

<sup>654</sup> Competition Appeal Tribunal Guide to Proceedings 2015, p. 72-73.

<sup>655</sup> Competition Appeal Tribunal Rules 2015, rule 104. See also rules 48 and 49, on the costs consequences of (not) accepting an offer to settle (similar to a CPR Part 36 offer; see section 5.1)

<sup>656</sup> Competition Appeal Tribunal Rules 2015, rule 98. See also section 5.3.6.1.

<sup>657</sup> Competition Appeal Tribunal Rules 2015, rule 98(1)(b) in conjunction with rule 88(2)(c) (for represented persons), and rule 98(2) (for class members).

<sup>658</sup> Competition Appeal Tribunal Rules 2015, rule 104(5)(b).

So far, two applications for opt-out collective proceedings have been made. Both actions have failed. The first application was made in March 2016, on behalf of people who had allegedly paid too much for a mobility scooter due to competition law breaches. The follow-on action was brought by the General Secretary of the National Pensioners Convention, according to whom it is ‘pretty plain that unless we or some other organisations acts, Pride will provide [the customers, mainly ‘vulnerable’ elderly] with no redress.’<sup>659</sup> The actual initiator, however, was Leigh Day, which operated on a CFA, backed by third-party litigation funding and ATE insurance.<sup>660</sup> The amount in dispute was estimated at £ 7.7 million and concerned approximately 34,000 customers. The case was withdrawn after the CAT had adjourned the application in order to amend the claim. In short, the claimant had not sufficiently addressed quantification and causation as she had approached the estimation of loss on the wrong basis. The CAT did approve of the class representative and her legal team. Relevant in this respect was the experience of the law firm, its satisfactory litigation plan, a detailed costs budget, that it had secured the services of a (US) company with extensive experience in class action administration and a neutral third party to – in the event of a successful outcome – assess and process claims and determine disputes thereon.<sup>661</sup> The CAT did not find it objectionable that the impetus for the action came from Leigh Day:

*‘This seems to us almost inevitable with collective proceedings in particular for consumers, most of whom would be unaware that it was practicable to bring proceedings of which the cost vastly exceeds the individual loss they suffered. The relevant question is whether the class representative is able to ensure that the proceedings are then conducted in the interests of the class and not of the lawyers.’<sup>662</sup>*

The fact that the ATE insurance would potentially not cover all of the adverse costs was also not deemed to be problematic, that is, at this stage of the proceedings. Relevant aspects were the statement of the litigation funder that it would be able to increase the insurance indemnity and of Leigh Day that it would give priority to paying adverse costs over the recovery of its own.<sup>663</sup>

The second claim was dismissed, and the application for permission to appeal against the decision was refused in September 2017.<sup>664</sup> The application was refused in the certification stage as, in essence, it lacked i) a sufficiently sound method to calculate a sum which reflects an aggregate of individual claims for damages and ii) a reasonable and practicable means for estimating the individual loss which could be used as the basis for distribution. Moreover, even if an approximation of the individual loss could be made, the collective proceedings would not result in damages being paid to those claimants in accordance with the governing principle of compensatory damages. Accordingly, the claims were not

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<sup>659</sup> Gibson v. Pride Mobility Products [2017] CAT 9, para. 130.

<sup>660</sup> Gibson v. Pride Mobility Products [2017] CAT 9, paras 135 and 140. See also T. Kinder, ‘Here come the US-style class actions’, *The Lawyer*, 14 June 2016.

<sup>661</sup> Gibson v. Pride Mobility Products [2017] CAT 9, paras 133-135.

<sup>662</sup> Gibson v. Pride Mobility Products [2017] CAT 9, para. 138.

<sup>663</sup> Gibson v. Pride Mobility Products [2017] CAT 9, para. 140-145.

<sup>664</sup> Merricks v. Mastercard [2017] CAT 21.

suitable for collective proceedings.<sup>665</sup> The fact that such a decision, in effect, would deprive the aggrieved consumers of compensation did not persuade the CAT to decide otherwise:

*'[T]hat is effectively the position in most cases of widespread consumer loss resulting from competition law infringements. It does not mean that an application to bring collective proceedings in such a case must always be granted. Every case has to be considered on its own terms, having regard to the statutory requirements.'*<sup>666</sup>

Of particular interest for entrepreneurial mass litigation is that the CAT nevertheless addressed Mastercard's attack on the permissibility of the litigation funding agreement.<sup>667</sup> The authorisation of the class representative did not concern the person as such, who in the words of the CAT was 'eminently suited' to act as a class representative. The defence focused on the terms of the LFA which Merricks had entered into with the third-party funder, as it i) limited the funded adverse costs (£ 10 million), which was deemed insufficient, and ii) the content of the LFA. This stipulated that the funder would receive a remuneration equal to the greater of i) £ 135 million or ii) 30% of the undistributed proceeds up to £ 1 billion, plus 20% of the undistributed proceeds in excess of £ 1 billion. According to Mastercard, the CA 1998 does not provide basis for such stipulation. Thus, the CAT would have to order against it, which would activate the funder's right to terminate the agreement and leave the applicant without funds to further pursue the litigation.

The relevant legal provisions, sections 47C CA(5) and (6), state that undistributed proceeds should be paid to charity, unless the CAT orders that the costs or the expenses incurred in connection with the proceedings be paid to the class representative. In Mastercard, the CAT first ruled that the payment to a litigation funder can be considered as such costs or expenses. If necessary, the CAT can order an expert opinion to address the question of whether the funder's payment (percentage) is appropriate, referring to *Essar v. Norscot* (where the arbitrator ruled that a payment due to the litigation funder is recoverable as the costs of arbitration). Second, the CAT approved these costs as being incurred by the class representative. This does require the LFA to provide for an obligation for the class representative to pay these costs or expenses from the unclaimed damages. This liability is conditional, however, as the CAT has to make an order to pay the class representative the equivalent amount under section 47C(6) CA. The defendant argued that the CAT does not have the power to make an order since no costs had been incurred, and the CA lacks wording such as CPR 44.1(3) to address the indemnity principle. The CAT dismissed this argument:

*'[S]ect 47C(6) CA is not an inter partes costs rule and it is not dependent on a strict application of the indemnity principle as that applies to recovery of costs. As we have already observed, it is a specific rule designed for a new and discrete procedural regime. The question is whether the statutory reference to a cost or expense being "incurred" is broad enough to cover a conditional liability. In our judgment, it is. Given the purpose of the CRA and the new collective proceedings regime, that is the correct and appropriate construction. Indeed, we think it is similarly the basis on which this provision, in conjunction with rule 93(4), enables the recovery out of unclaimed damages of the success fee or*

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<sup>665</sup> Merricks v. Mastercard and Others [2017] CAT 16, paras 67-89.

<sup>666</sup> Merricks v. Mastercard and Others [2017] CAT 16, para. 91.

<sup>667</sup> Merricks v. Mastercard and Others [2017] CAT 16, para. 92 ff.



*‘uplift’ element of legal costs “incurred” under a conditional fee agreement, which is not recoverable as costs in the High Court (and therefore does not fall within rule 104: see also rule 113). Put another way, if a funding agreement contained a clause stating:*

- a) the class representative is obliged to pay the funder’s fee of £x;*
- b) the obligation under sub-clause (a) is reduced to the extent that the amount which the Tribunal orders should be paid to the class representative in respect of his obligation falls below £x”*

*then we consider the obligation to pay the funder’s fee of £x would be a cost “incurred” within the meaning of sect 47C(6) CA. And on that basis, we do not see that the different formulation used in the amendment here should produce a fundamentally different result: that would elevate form over substance.*<sup>668</sup>

This judgment shows that although the costs of litigation funding (the payment or percentage to the funder) might not be recoverable as adverse costs by way of a costs award, they can be obtained through the awarded damages, that is, the part that ultimately remains unclaimed. This construction slightly resembles the LASPO change of 2013: the CFA success fee and ATE premium are no longer recoverable as part of the costs award, but in order to cover this ‘loss’ the awardable non-pecuniary damages can be increased by 10%. The funding construction also shows that a contingency fee is not the only route whereby a funder calculates the return on his investment. It might also be a fixed fee. In this way, a conflict of interests as to the content of the settlement might be avoided; for instance, if no pecuniary damages are awarded but a change of contract. Through the fixed fee arrangement, a funder still receives his payment.

The court rejected the submission that the funding construction creates a potential incentive for the class representative to ‘ensure that there is a sufficient amount of unclaimed damages’, which would create a conflict with the interest of the class to maximize the amount of damages claimed and distributed to them. In particular in the situation of a potential settlement, where the defendant has an incentive to settle as, in that case, the undistributed damages could be reverted to the defendant. The CAT rejected this objection; as to the distribution of damages to the class members, it deemed to be sufficient that the LFA requires the class representative to act independently and have sole control of the litigation in the best interests of the class. If damages are awarded, all class members must be notified, as approved by the CAT:

*‘In deciding to whom the damages are paid [applicant or some other entity], the Tribunal will need to be satisfied that the recipient is able and willing to make all reasonable efforts to achieve the fullest distribution to members of the class, and may seek appropriate undertakings if necessary.’*

The defendant had also raised the concern that, given the scale and complexity of the proceedings, the funder’s liability to cover a potential adverse costs award of £ 10 million would not suffice to cover Mastercard’s costs, and the LFA did not have flexibility to increase this sum, referring to the applicant’s costs budget of £ 19.5 million. The CAT rejected this ground of objection. It ruled that as the applicant had started from scratch with these proceedings, and Mastercard had already done a substantial

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<sup>668</sup> Merricks v. Mastercard and Others [2017] CAT 16, para. 125.

amount of work in comparable proceedings, it was not necessary that Mastercard's litigation costs would be equivalent to those of the applicant. As Mastercard had not submitted an estimate of its own costs, which would be a first step in the challenge at hand, the CAT 'has no basis at this stage to find that £ 10 million is likely to be inadequate for Mastercard's potential recoverable costs, which (on the standard basis) would have to be proportionate and reasonable.' This also in light of the fact that Mastercard, at any later stage, could file to vary or revoke a collective proceedings order or stay the collective proceedings.

It has been announced that a third case will be brought by the trade body Road Haulage Association against the trucks cartel, on behalf of any business that has suffered loss. The follow-on opt-out collective proceedings will be brought against various truck manufacturers for participating in a price-fixing cartel that was fined by the European Commission in 2016 (€ 3.4 billion).<sup>669</sup> The claim is being funded by Therium Capital, and underwritten by ATE insurance:

*To ensure that as many affected hauliers are able to join the claim, we have secured funding from Therium Capital Management Limited and the largest tranche of After The Event insurance that's ever been underwritten so there's no cost to joining the claim, or any other risks if the claim is unsuccessful.*<sup>670</sup>

The brochure issued by the RHA furthermore mentions with regard to the funding:

*Based on conservative assumptions in relation to the level of damages per truck and the overall number of trucks that are in the RHA's claim, the level of return to the funder will be at most 9% and may be as low as 5%. If the case settles early, these percentages will be reduced by a third, thereby returning even more of the compensation to operators.*<sup>671</sup>

To conclude, both actions show a potential for entrepreneurial parties to engage in collective proceedings. Both actions failed on substantive aspects, that is, on (the method and means of determining) causation and quantum.

### **5.5.7 Competition law: collective settlement**

To encourage parties to settle their dispute, the CAT can approve a collective settlement upon the application of the representative claimant and wrongdoer(s). With regard to the representative body, the collective settlement regime operates on the same premises as the above collective proceedings regulation. An application for approval can be made whether or not a collective proceedings order has been made.<sup>672</sup> The CAT has to assess whether it deems the terms of the collective settlement to be

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<sup>669</sup> See <truckcartellegalaction.com> and <rha.uk.net/news/press-releases/2016-11-november/rha-to-pursue-its-intention-to-claim-compensation>.

<sup>670</sup> <rha.uk.net/news/press-releases/2017-06-june/rha-launches-funded-legal-action-against-the-truck-cartel>.

<sup>671</sup> The brochure is available at <cdn2.hubspot.net/hubfs/3387682/documents/truck-cartel-bm-version.pdf?t=1500302050164>.

<sup>672</sup> CA 1998, sections 49A and 49B, as implemented with the CRA.

just and reasonable.<sup>673</sup> If the CAT has not yet made a collective proceedings order, and the parties apply for the approval of the collective settlement, it has to make a collective settlement order; this order is not required if a collective proceedings order has previously been made.<sup>674</sup> In the former situation, the CAT also needs to approve the adequacy of the representative and whether the claims that underlie the settlement would have been suitable for collective proceedings.<sup>675</sup> Class members are bound by the collective settlement (order) unless they opt out.<sup>676</sup>

As to costs and fees, the application must set out the terms of the settlement, including the payment of costs, fees and disbursements.<sup>677</sup> They are considered part of the overall settlement terms, and thus subject to the CAT's assessment of the reasonableness thereof. The application should also detail what happens to any undistributed settlement funds. A provision that any unclaimed balance of the settlement amount reverts to the defendants shall not of itself be considered unreasonable.<sup>678</sup>

The approach towards 'pre-existing bodies' (which include entrepreneurial parties) is similar to the one in collective proceedings.<sup>679</sup> The representative needs to be suitable. It needs to act both fairly and adequately in the interests of the class members.<sup>680</sup> With the approval of the CAT, class members may participate in the approval process.<sup>681</sup> If the settlement follows a collective proceedings, and class members have not opted out, they can still do so after the collective settlement has been approved.<sup>682</sup>

To date, no application has been made to approve a collective settlement under the new regime.

## **5.6 Summary: rules and features that shape English entrepreneurial mass litigation**

In the following, I will summarize the main findings on the elements that affect the operation of entrepreneurial mass litigation in England and Wales.

For a continental lawyer, the English civil justice landscape comes across as a rather complex one, with its abundance of different types of courts, a less strict division between private and public proceedings, and flexibility in developing the law. It also shows a strong focus on efficiency, within the context of collective redress as well. Judges' toolboxes have been seriously replenished with various case management tools. They are no longer mere umpires, and party autonomy is on an equal footing with the overriding objective, pursuant to which courts deal with cases efficiently (timely and cost-effectively) yet justly. The tools include various sanctions to address non-compliance with court orders. Moreover,

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<sup>673</sup> CA 1998, sections 49A(5) and 49B(8).

<sup>674</sup> CA 1998, section 49B(4).

<sup>675</sup> CA 1998, section 49B(5).

<sup>676</sup> CA 1998, section 49A(6) to (10) respectively section 49B(9) and (10).

<sup>677</sup> Competition Appeal Tribunal Rules 2015, rule 94(4)(b) and (9)(a). See also Competition Appeal Tribunal Guide to Proceedings 2015, p. 86, and Mulheron 2015, p. 11.

<sup>678</sup> Competition Appeal Tribunal Rules 2015, rule 94(9)(g).

<sup>679</sup> Competition Appeal Tribunal Guide to Proceedings 2015, p. 89. See section 5.5.6.

<sup>680</sup> Competition Appeal Tribunal Rules 2015, rules 96(10) and (11).

<sup>681</sup> Competition Appeal Tribunal Rules 2015, rules 94(7) and 97(5). See also Competition Appeal Tribunal Guide to Proceedings 2015, p. 90-91.

<sup>682</sup> Competition Appeal Tribunal Rules 2015, rule 94(10) and 97(8).

consensual settlement is stimulated at the earliest appropriate occasion and incentivised and facilitated by various legal instruments. England & Wales have a traditionally strong international position in commercial litigation and seem keen to maintain it. Within the context of mass litigation, law firms and litigation funders increasingly cooperate, also at an international level. The main aspect of English civil litigation that has shaped its functioning are the high litigation costs (risk).

Nowadays, the English legal services market can be qualified as a fairly open one. The historical monopoly of solicitors and barristers has been broken down. Within the context of mass litigation three additional types of (entrepreneurial) parties have been identified that are active on the claimants' side: claims management companies, third-party litigation funders and – tentatively – special purpose vehicles. They both complement and compete with solicitors' provision of legal services. The level of the regulation and supervision of the providers varies. In addition to being subject to professional (liability) rules, lawyers are bound by ethical rules and standards on, inter alia, their remuneration and business model. Supervisory scrutiny is increasingly vigorous. Claims Management Companies mainly operate within the context of personal injuries and financial products and services. Due to a surge in abusive behaviour such as unsolicited direct approaches and charging excessive fees, regulatory oversight is increasing. Third-party litigation funders might be governed by the Association of Litigation Funders and its self-regulatory Code of Conduct. Compliance, however, is optional since membership is not compulsory. Third-party litigation funders and special purpose vehicles are (also) subject to general civil law. Within that context, the ancient doctrines of maintenance and champerty give colour to the current concept of public policy. In essence, these common law doctrines relate to entrepreneurial engagement in civil litigation, which has been condemned for centuries due to risks of aggravating claim amounts, tampering with evidence, blackmail or collusive settlements, and otherwise undue litigation conduct. However, the scope of the doctrines has progressively narrowed in the past decades and both courts and the legislator are increasingly liberal towards entrepreneurial parties as enablers of access to justice. Yet, courts' scrutiny remains thorough, focused on the 'integrity of civil litigation'. This is also observable in their application of the admissibility rules in mass litigation. *If* entrepreneurial parties are allowed to engage in such proceedings, courts are strongly focused on preventing abusive behaviour in order to protect the interests of class members and defendants, and the objective of efficient litigation.

Litigation costs form an important, if not essential aspect of civil litigation. The English costs regime has rendered (own and *inter partes*) litigation costs complex, unpredictable and high, without parallel. The main contributing elements are the freely negotiable lawyers' fees and market failure to exert pressure on the rates, relatively full indemnity in costs shifting, including – until 2013 – the recoverability of CFA success fees and ATE insurance premiums, the large number of costs rules and the discretionary power of courts as to whether and to which extent costs are shifted. Measures to reduce costs and create efficiency and predictability have been implemented as of the early 2000s. Increasingly, costs are considered at the outset and throughout litigation, as opposed to 'merely' upon the conclusion of litigation. This is facilitated by principles such as the overriding objective and proportionality, and techniques such as costs management conferences and orders, and fixed recoverable fees. The effects thereof vary, but a slow change towards more predictability and proportionality in the costs landscape is observable. In light of the high costs risk, unsurprisingly, security for costs is an important aspect of (mass) litigation. Such an order can be awarded against claimants and, under certain circum-

stances, against non-parties such as entrepreneurial ones. Litigation conduct is an important and commonly invoked or addressed aspect of costs shifting; undue behaviour is regularly addressed with costs sanctions. Costs aspects of an out-of-court settlement can be assessed with regard to their reasonableness by way of costs-only proceedings. Furthermore, the costs and fees that are part of a settlement agreement are subject to judicial scrutiny in collective settlement proceedings (competition law).

Successful initiators of collective redress that are party to proceedings can recover their litigation costs from the defendant. Between 2000 and 2013, this included the costs of CFA litigation (the success fee). This created a serious market failure. Claimants, in effect, bore no financial risk and their lawyers were incentivized to raise their success fee to the maximum. Defendants contested costs and the recoverability thereof whenever possible. Courts were not sufficiently able or experienced to mitigate the influx of fees and satellite litigation. Eventually, the legislator revoked the recoverability of CFA success fees and ATE insurance premiums. Claimants are now encouraged to take responsibility for litigation costs by having to pay the success fee and ATE premium out of the proceeds of litigation. Courts now 'only' assess base costs, which excludes the (reasonableness of the) success fee. Some additional measures have been implemented to soften the blow for claimants, such as a 10% increase in damages for pain, suffering and loss of amenity and qualified one-way costs shifting in personal injury cases. Few routes remain for claimants or entrepreneurial parties to recover a conditional or contingency fee from defendants. For instance, under certain circumstances, the costs of funding collective proceedings (competition law cases) can take place by recovering the fee out of the unclaimed (undistributed) damages. In such cases, if necessary, courts can invoke the opinion of market experts to assess the reasonableness of the charged rates and terms.

Costs rules enable a prevailing defendant to widen the scope of liability for adverse costs to a non-party such as an individual class member or entrepreneurial party. For instance, the *Arkin* and *Excalibur* cases have demonstrated that entrepreneurial non-parties can also be subjected to liability for adverse costs and/or costs sanctions, even if their own behaviour was immaculate. Allegedly, this potential liability has incited third-party litigation funders to screen cases even more rigorously and to intensify their control over litigation, as far as this is allowed under the doctrines of maintenance and champerty.

The high and unpredictable litigation costs, the budget cuts in legal aid, and their effect on access to justice have fuelled the growth of private litigation funding schemes. In addition to the already existing conditional fee arrangements (which are linked to the lawyer's hourly fee), lawyers are now allowed to operate under damages-based agreements (linked to the awarded or recovered damages). ATE insurance can still cover the risk of having to pay an adverse costs order. However, it is a niche market with limited capacity, in particular for large and complex claims. Third-party funders increasingly participate in mass litigation. The disclosure of (the terms of) the funding arrangement or ATE policy can be ordered if such disclosure aids case management or helps in assessing the level of control over the course of litigation. Of relevance for a court in the assessment of such an application is the potential risk of such information being misused by the defendants, and/or the risk of inducing satellite litigation, and – within the context of third-party litigation funding – that the funder is not a party to the proceedings. Under the old regime of the recoverability of CFA success fees, the amount of the potential additional liability or method of calculation (such as the percentage) did not have to be disclosed until the costs assessment at the end of litigation. As to the percentage of success or contingency fees,

in commercial litigation the freedom of contract applies, but within the boundaries of public policy (which an excessive percentage can infringe). In consumer law, as to claims management companies, the government has increasingly regulated their practices, including a current proposal to cap their fees.

English law's longstanding preference for 'completeness in adjudication' and the implementation of the overriding objective has various initiatives to settle mass damage. Nowadays, various routes exist to obtain collective redress. The following horizontal instruments – which apply to all types of civil cases – exist: consolidation of claims, joinder of parties, test cases, representative action, group litigation and the assignment model. In addition, in consumer law a court can attach enhanced consumer measures to an enforcement order brought by a public or private body, and in competition law, a class representative can bring collective (settlement) proceedings. The number of routes and their varying rules leave the collective redress landscape relatively cluttered. The routes are of varying efficiency and effectiveness – whether or not they allow the initiator(s) to claim for damages. Furthermore, the principle of individual and full compensation remains at the forefront, also when it comes to collective redress. In combination with the complexity of mass litigation and its high costs (risk), this all means that the mechanisms are risky routes to take. Case law shows that parties are sometimes reluctant to undertake action after mass damage events. Nevertheless, a 'claimants' bar' is gradually growing, with different and creative types of costs and litigation funding arrangements while displaying mildly competitive behaviour. Case law furthermore shows an acceptance of entrepreneurial parties and, thus, a potential to further engage in mass litigation, for instance in collective proceedings in competition law.

To conclude, Table VII lists the rules and features that potentially mediate the beneficial or disadvantageous operation of entrepreneurial mass litigation, per addressed key issue.

Key issue	Distilled rule or feature
Essentials of the civil justice landscape	<ul style="list-style-type: none"> <li>- Flexibility of the common law system</li> <li>- Strong focus on (cost) efficiency through active case management</li> <li>- Increasing focus on a negotiated settlement and ADR</li> <li>- Focus on jurisdictional competition and international commercial litigation</li> </ul>
The legal services market	<ul style="list-style-type: none"> <li>- Open and competitive legal services market</li> <li>- Development of a 'claimants bar' in mass litigation, mildly competitive</li> <li>- Clear and strict regulation and supervision of lawyers</li> <li>- Ban on referral fees to a third party in personal injury cases</li> <li>- Increasing regulation and supervision of claims management companies, e.g. marketing, claims referral, complaint handling, client account and charged fees</li> <li>- Self-regulation of third-party litigation funders. Code of Conduct includes rules on capital adequacy, control of the dispute, and the termination of the LFA. Supervision by ALF</li> <li>- The Code of Conduct does not require litigation funders to publicise information on disputes between funders and funded parties</li> <li>- Professional liability rules</li> </ul>

Litigation costs and costs shifting	<ul style="list-style-type: none"> <li>- Complex and unpredictable costs system, in particular due to freely negotiable lawyers' fees, judicial discretion, and a large number of costs rules</li> <li>- Specialized costs court</li> <li>- High litigation costs, related to lawyer-driven and labour-intensive proceedings and relatively full indemnity in costs shifting</li> <li>- Security for costs can be (and often is) ordered in mass litigation</li> <li>- Security for costs can be ordered against a non-claimant, such as an entrepreneurial party</li> <li>- Loser pays rule: potentially full indemnification of prevailing party's litigation costs</li> <li>- Level of indemnification is subject to judicial discretion as to which costs are shifted and what amount</li> <li>- Various (often applied) cost sanctions for undue litigation conduct</li> <li>- Qualified one-way costs shifting in personal injury cases</li> <li>- Costs capping and protective costs order</li> <li>- Non-recoverability of CFAs, DBAs and ATE premiums</li> <li>- Possibility to hold a non-party liable for adverse costs order</li> <li>- Extensive litigation over costs (cost wars / satellite litigation)</li> <li>- Costs-only proceedings</li> </ul>
Private litigation funding	<ul style="list-style-type: none"> <li>- Various types of litigation funding, despite restrictions due to the doctrines of maintenance and champerty</li> <li>- Developed market for litigation funding</li> <li>- Thorough due diligence assessment</li> <li>- Judicial assessment of (the reasonableness of) litigation funding arrangements</li> <li>- Third-party litigation funders act as additional key player to the representative organization and its lawyers</li> <li>- Fee caps for claims management companies</li> </ul>
Specificities and safeguards of the collective redress mechanisms	<ul style="list-style-type: none"> <li>- Statutory criteria for and judicial assessment of class representative</li> <li>- Collective settlement: judicial assessment of the settlement, including of costs and fees</li> <li>- Provide information on financial means</li> <li>- Increasingly liberal approach towards entrepreneurial parties</li> </ul>

Table VII: English rules and features that potentially mediate the benefits or drawbacks of entrepreneurial mass litigation

## 6 The Netherlands

*‘What is interesting is how many entities from outside the Netherlands – particularly from the United States – have hopped on board this case [the Petrobras collective action]. U.S. law firms and funding organisations bring with them the tactics, culture and expectations of the United States civil litigation system – a system that many in Europe have decried as rife with baggage that does not belong in European courts.’<sup>1</sup>*

### 6.1 Setting the scene: some essential features of the civil justice landscape

The Dutch civil justice system seems to function rather adequately. Worldwide, the Netherlands continues to feature among the countries with an efficient legal framework for settling disputes.<sup>2</sup> In the Rule of Law Index 2016, provided by the World Justice Project, the Netherlands was in first place in the category of ‘civil justice’.<sup>3</sup> Nevertheless, in the past few decades, the Dutch civil litigation landscape has been anything but stationary. In 2002, the rules of civil procedure were fundamentally reformed, and the process of reorganization and re-examination has continued. I will highlight some salient developments.

Since the restructuring of the judicial map in 2013, the Netherlands is now divided into 11 districts, each with a court of first instance (*rechtbank*). Each district court has several sectors, including a civil sector and a sub-district sector (*kanton*), which deals with civil cases with a disputed value that does not exceed € 25,000 and cases on tenancy, labour or consumer law. For civil law, there are four Courts of Appeal (*Gerechtshof*) and the Supreme Court (*Hoge Raad*). Civil cases with a disputed value that exceeds € 1,750 can be subject to an appeal. Parties do not need permission to appeal and – within limits – can amend their claim or introduce new facts. A party may lodge an appeal in cassation at the Supreme Court if there has been a violation of the law or a breach of procedure.

As in other European jurisdictions, there has been a growing focus in the Netherlands on the quality of litigation, the responsibility of the parties involved, the simplification of the civil procedure, and its

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<sup>1</sup> Terzino, M.H., ‘Collective actions in the Netherlands: transnational trouble?’, 1 March 2017 at <justice-notprofit.co.uk>.

<sup>2</sup> Ranking 12<sup>th</sup> (out of 138 jurisdictions) on this indicator in the Global Competitiveness Index 2016-2017, as reported by the World Economic Forum; see <www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017\_FINAL.pdf>, p. 277. In comparison: the UK ranks 6th and Germany 17th on this indicator, see p. 355 and p. 187.

<sup>3</sup> See <worldjusticeproject.org/sites/default/files/media/wjp\_rule\_of\_law\_index\_2016.pdf>, p. 40-41 (Factor 7). The Netherlands scores .78 on Accessibility and affordability (with an overall score of .88), see p. 117, whereas the UK scores 0.56 (with an overall score on civil justice of .75), and Germany .73 (with an overall score of .86), see p. 152 respectively p. 86.



speed and costs.<sup>4</sup> Next to the aforementioned reform of civil procedure in 2002, two notable examples are the increase in the small claims limit for civil commercial cases that fall under the jurisdiction of the sub-district court (where representation by an attorney is not required, see section 6.2) from € 5,000 to € 25,000 in 2011,<sup>5</sup> and the simplification and digitalisation of civil procedure that has been set in motion with the governmental programme ‘Quality and Innovation’ (*KEI*) as launched in 2012.<sup>6</sup> At the same time, austerity measures have affected the civil justice system as well; publicly funded legal aid has decreased, court charges for claims over € 25,000 have increased – although a legislative proposal to introduce cost-effective court charges was withdrawn – and, as mentioned, the judicial organization has been restructured.<sup>7</sup> Some fear that the successful reforms will be endangered by new austerity measures,<sup>8</sup> others see it as a boost for further innovation, also outside the judicial arena.<sup>9</sup> A case in point is the surge in privatization to diminish the pressure on the judicial system. Various initiatives are directed towards reducing court-based and formal dispute resolution, focusing on reconciliation and the underlying interests of parties. The Netherlands has a strong and well-developed tradition of extrajudicial dispute resolution,<sup>10</sup> and the judiciary continues to develop working methods that better align with parties’ needs and stimulate parties to settle instead of litigating.<sup>11</sup> One of the main principles of Dutch civil procedure is party autonomy. This is placed, however, within a framework of judicial case management; with regard to the course of litigation, the traditional concept of judicial passiveness is on the wane. An influential report by Asser/Groen/Vranken on the fundamentals of civil litigation has emphasized that since the 2002 reforms, litigation is a shared responsibility between courts and litigants,<sup>12</sup> and some have argued that the *laissez faire* attitude in civil litigation has been abandoned, albeit implicitly.<sup>13</sup> Generally, litigants control the scope of litigation, the presentation of

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<sup>4</sup> Two notable studies are Asser e.a. 2006 and De Bock 2015. For quantitative reports on dispute resolution see, notably, the multi-annual reports Dispute resolution delta (*Geschiedbeslechtsingsdelta*) of 2003, 2008 and 2014, which are based on the UK *Paths to Justice* Studies, and the reports *Rechtspleging Civiel en Bestuur*, all available at [www.wodc.nl](http://www.wodc.nl).

<sup>5</sup> For an evaluation of this measure, see Eshuis & Geurts 2016.

<sup>6</sup> See, for instance, Asser e.a. 2015.

<sup>7</sup> See, for instance, *Kamerstukken II* 2013/14, 31753, 64 (legal aid), *Kamerstukken II* 2008/2009, 31758, 3 (court charges), and *Kamerstukken II* 2010/11, 32891, 3 (reorganization of the judiciary). See also *Kamerstukken II* 2012/13, 33071, 11 (withdrawal of the legislative proposal on cost-effective court charges).

<sup>8</sup> Van Rhee 2014, p. 77.

<sup>9</sup> Brenninkmeijer e.a. 2015.

<sup>10</sup> See, for instance, the draft legislative proposal on the stimulation of mediation, available at [internetconsultatie.nl/wetmediation](http://internetconsultatie.nl/wetmediation), *Kamerstukken II* 2012/13, 33611, 3 and Meijer & Snijders 2015 on the modernisation of the arbitration regulation, and Knigge & Verhage 2016 and Weber & Hodges 2012 on the successful Dutch Consumer Complaints Boards (*Geschillencommissies*) such as the KiFiD for financial services complaints.

<sup>11</sup> Such as the project eKantonrechter (online dispute resolution, see [rechtspraak.nl/Naar-de-rechter/Kantonrechter/eKantonrechter/Pages/default.aspx](http://rechtspraak.nl/Naar-de-rechter/Kantonrechter/eKantonrechter/Pages/default.aspx)), and the pilot programmes ‘Gericht op Oplossing’ (short track, mediation-like litigation, see [rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Amsterdam/Regels-en-procedures/Paginas/Procedure-Gericht-Op-Oplossing.aspx](http://rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Amsterdam/Regels-en-procedures/Paginas/Procedure-Gericht-Op-Oplossing.aspx)) and mediation in bankruptcy cases (see [baliebulletin-middennederland.nl/rechtbank-midden-nederland-start-pilot-mediation-in-faillissementen/>](http://baliebulletin-middennederland.nl/rechtbank-midden-nederland-start-pilot-mediation-in-faillissementen/>)). On more judicial innovations, initiatives and case management see, for instance, Steenberghe 2009, Dozy & Valk 2010, Dozy 2012, Smilde & Van Leuven 2013, and Dijkstra 2014.

<sup>12</sup> Asser e.a. 2006.

<sup>13</sup> Verkerk 2011, p. 30.

facts and the commencement and conclusion of a case, but courts' discretionary powers to interfere and manage the course of litigation have gained importance and usage since 2002.<sup>14</sup>

The focus on negotiations, settlement and case management is also noticeable in the design of the collective redress mechanisms. As mentioned in section 2.2.4, both the collective action and the WCAM regulation, as well as the proposed reform of collective action, stimulate or even revolve around negotiations and consensual dispute resolution. Furthermore, an important role is allocated to private representative organisations.<sup>15</sup>

The Dutch government and the judiciary also focus on the international position of Dutch civil justice, and foreign law firms might be increasingly inclined to set up shop in the Netherlands or cooperate with Dutch law firms.<sup>16</sup> For instance, as of 2016, parties can opt to litigate in English before the maritime chamber of the Rotterdam District Court in cases concerning maritime and transport law and the international sale of goods,<sup>17</sup> while for international commercial cases, a pending legislative proposal aims to introduce the Dutch Commercial Court and Court of Appeal.<sup>18</sup> Within the context of collective redress, the government continues to put the spotlight on the WCAM regulation and its (inter)national success.<sup>19</sup> In response to concerns that were raised against the Amsterdam Court of Appeal's liberal reasoning on its international jurisdiction in the *Converium* case, the Minister of Security and Justice stated that he would look closely at the developments to see whether they require a further regulation of the WCAM, but that the Amsterdam Court of Appeal's judgment shows that the WCAM also provides foreign companies with an effective method to end a large-scale international dispute. The minister furthermore noted that the international jurisdiction was not contested by any of the interested parties.<sup>20</sup>

## 6.2 The regulation and supervision of the legal services market

The Dutch market for legal services can be qualified as a relatively open one. Attorneys (*advocaten*), bailiffs and notaries are regulated by law and are also self-regulated. In general, others are free to provide legal services, and for activities such as debt collection they are not required to obtain a licence or authorization. Consequentially, various types of other providers operate in the legal services market, such as in-house lawyers, legal advice or debt collection agents, mediators, and, in particular,

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<sup>14</sup> See, for instance, Van Schaick 2016, no. 8 and De Groot 2012.

<sup>15</sup> See section 6.4.4.2.

<sup>16</sup> See, for instance, 'Nederland wordt straks paradijs voor massaclaims; Rijk gaat wetgeving verbeteren', *Financieele Dagblad* 29 december 2011 and Kaal & Painter 2012. See also section 6.5.6.2.

<sup>17</sup> See <[rechtspraak.nl/SiteCollectionDocuments/Procedure-Rules-for-proceedings-in-English.pdf](https://rechtspraak.nl/SiteCollectionDocuments/Procedure-Rules-for-proceedings-in-English.pdf)>. The chamber also offers English summaries of port-related civil court rulings, see <[rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Rotterdam/Over-de-rechtbank/Organisatie/Paginas/English-summaries-of-civil-court-cases.aspx](https://rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Rotterdam/Over-de-rechtbank/Organisatie/Paginas/English-summaries-of-civil-court-cases.aspx)>.

<sup>18</sup> *Kamerstukken II* 2016/17, 34761, 3.

<sup>19</sup> *Kamerstukken II* 2008/09, 31762, 1, p. 8.

<sup>20</sup> *Kamerstukken II* 2012/13, 33126, 7, p. 7.

legal expenses insurers.<sup>21</sup> The number of households with such insurance has increased from 24% in 2004 to 42% in 2013.<sup>22</sup> As of 2011, the growth of the bar has slightly declined,<sup>23</sup> and in the period 2012-2017, a legal services provider for (seven) legal expenses insurers was the fastest growing provider as to the number of attorneys employed.<sup>24</sup> It is likely that these developments are – also – related to the aforementioned increase in the small claims limit from € 5,000 to € 25,000 in 2011.

Either way, attorneys have retained their monopoly on legal representation in civil cases that do not fall under the jurisdiction of the sub-district court or (for defendants) that of the preliminary relief judge who deals with summary proceedings and temporary provisions.<sup>25</sup> Consequentially, civil professional liability rules aside,<sup>26</sup> Dutch attorneys are bound by professional and disciplinary rules and regulation.<sup>27</sup> In 2014, the Attorneys Act was revised after a long and fierce debate, particularly on the – ultimately largely in vain – attempt by the Minister of Security and Justice to strengthen the supervision of attorneys.<sup>28</sup> Attorneys are supervised by the local and national (dean of the) Bar Association (*Orde van Advocaten*, a public law body).<sup>29</sup> The local bar associations are overseen by the Supervisory Council (*College van Toezicht*).<sup>30</sup> Client-attorney disputes on, inter alia, the quality of representation or the fees charged can be resolved before the district court or, if agreed upon, before the Disputes Committee for the Legal Profession (*Geschillencommissie Advocatuur*).<sup>31</sup> Attorneys' behaviour that – allegedly – has infringed disciplinary rules is dealt with by the dean of the local bar association and,

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<sup>21</sup> See Van Velthoven & Klein Haarhuis 2010, p. 120, Holthinrichs 2013, p. 97, Ter Voert & Klein Haarhuis 2016, p. 116-117 and Eshuis & Geurts 2016, p. 97 ff.

<sup>22</sup> Ter Voert & Klein Haarhuis 2016, p. 34-35. Eshuis & Geurts have shown through peer ratings and party evaluations of the quality of representation, that legal expenses insurers score the highest – better than, for instance, independent attorneys; see Eshuis & Geurts 2016, p. 97 ff. A game changer for the popularity of legal expenses insurance might have been the ECJ's decision in the *Sneller v. DAS* case that stated that, generally, a legal expenses insurance policy holder is free to choose his/her attorney, including in proceedings before the sub-district court. See Case-442/12, *Sneller v. DAS Nederlandse Rechtsbijstand Verzekeringsmaatschappij*, and on its consequences for the Dutch legal services market see, for instance, Holthinrichs 2013.

<sup>23</sup> Verkijk 2014; see also the 2016 annual report of the Bar Association, available at <advocatenorde.nl/nieuws/nova-publiceert-jaarverslag-2016>, p. 16.

<sup>24</sup> *SRK Rechtsbijstand*; see the annual report 'State of the Bar', available at <advocatiemagazine.sdu.nl/maart-2017#!de-stand-advocatuur-en-notariaat>.

<sup>25</sup> Sections 79, 255 and 353 Rv.

<sup>26</sup> For which liability insurance is mandatory, pursuant to section 6.24 Regulations for attorneys (*Verordening op de advocatuur*).

<sup>27</sup> *Kamerstukken II* 2011/12, 32382, 7, p. 2. The Attorneys Act (*Advocatenwet*) is the main source. In addition, the Regulations for attorneys, the Code of Conduct (*Gedragregels 1992*) and the Code of Conduct for Lawyers in the European Union provide the (self-)regulatory framework that attorneys have to comply with. The disciplinary board and the court of appeal (see hereafter) can use the rules in the non-binding Code of conduct as a guideline to interpret the open norms of the Attorneys Act (in particular, section 46) and the Regulations for attorneys; see, for instance, De Groot-van Leeuwen 2016, p. 529-530, with further references. On the reciprocity between civil professional liability and disciplinary measures see, for instance, Van Dam-Lely 2016.

<sup>28</sup> On the legislative proposal (32382) and the new Attorneys Act see, for instance, Bannier 2011, Verkijk 2014 and Hesemans 2015.

<sup>29</sup> Sections 26 and 45a Attorneys Act.

<sup>30</sup> Section 45i Attorneys Act.

<sup>31</sup> Section 28 Attorneys Act in conjunction with section 6.29 Regulations for attorneys.

if the complaint remains unresolved or if the dean deems it to be necessary, before the Disciplinary Board (*Raad van Discipline*) and the Disciplinary Court of Appeal (*Hof van Discipline*).<sup>32</sup>

As of 2014, the Attorneys Act lists the five core principles that provide the legal framework for assessing an attorney's professional behaviour: independence, partiality, professionalism, integrity and confidentiality.<sup>33</sup> The Code of conduct (*Gedragsregels*) also reflects these principles. The focus on a negotiated settlement, as discussed in the previous section, is also ingrained in the code; section 3 stipulates that such a settlement is often preferable to a litigated outcome. The Code of conduct also stipulates that an attorney is required to examine whether the client is eligible for public legal aid, that its remuneration should be reasonable, that contingency fees are generally not allowed, and that an attorney is required to inform a client of the financial consequences of pursuing its claim.<sup>34</sup> Attorneys who hold client funds are required to set up a trust account (*derdengeldenrekening*).<sup>35</sup> Attorneys are not allowed to grant or receive remuneration or a fee for securing an engagement referral fee (*provisieverbod*), although this prohibition is criticised.<sup>36</sup> Until 1989, they were also not allowed to market and advertise their services.<sup>37</sup> Currently, social media activities are increasing and the growing competition between the various legal services providers has boosted marketing strategies; however, it is still not common for attorneys to advertise their services other than in legal and professional journals.<sup>38</sup>

Within the context of collective redress, various special purpose vehicles – such as representative organizations that aim to protect the interests of aggrieved parties – complement or compete with attorneys' legal services.<sup>39</sup> In court, they need to be represented by an attorney, unless the amount in dispute does not exceed € 25,000 (which is less likely to occur within the context of mass litigation). General civil law requirements aside, including corporate law and admissibility rules in collective redress regulation, such organizations are not specifically regulated by law.<sup>40</sup> As opposed to attorneys, they are, for instance, not bound by restrictions on contingency fees and are not required to set up a trust account. Anyone can establish a special purpose vehicle. In some mass harm events, legal expenses insurers have done so as well, in order to protect the interests of insured class members.<sup>41</sup>

A claim vehicle that acts as a representative organization in a collective action or WCAM settlement can be either a foundation (*stichting*) or an association (*vereniging*) with full legal capacity. According

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<sup>32</sup> Section 46c and 46d Attorneys Act.

<sup>33</sup> Section 10a Attorneys Act.

<sup>34</sup> Sections 24-26 Code of conduct and section 7.7(1) Regulations for attorneys. See further section 6.3.2.

<sup>35</sup> Section 6.18 ff Regulations for attorneys.

<sup>36</sup> Section 2(2) Code of conduct. See, for instance, Gloudemans-Voogd 2016, p. 28-29.

<sup>37</sup> Pursuant to sections 7-9 of the predecessor to the Code of conduct (*Ereregelen 1968*) and sections 37-38 of the Code of conduct 1980 (*Gedragsregels 1980*). See Wladimiroff 1993.

<sup>38</sup> See <[legalcoffee.nl/2015/08/advocaten-zijn-slecht-in-marketing-zo-moet-het-wel/](http://legalcoffee.nl/2015/08/advocaten-zijn-slecht-in-marketing-zo-moet-het-wel/)>.

<sup>39</sup> See Cornegoor 2009, Lemstra 2009 and Van Boom 2010, p. 167-177. On the two types of special purpose vehicles that can be distinguished, representative organizations and vehicles that bundle assigned claims or mandates, see section 6.4.4.

<sup>40</sup> See also section 6.4.4 ff.

<sup>41</sup> For instance, in the DSB case that, ultimately, resulted in a WCAM settlement; see section 6.5.4.2.

to Dutch law, foundations and associations are legal entities established for a particular goal. Although both entities are allowed to be driven by profits, profits cannot be paid out to the founders or (board) members. Any profits made must be distributed in line with the goal of the foundation or association.<sup>42</sup> Those governing the foundations and associations are eligible to obtain a salary. In contrast to foundations, which are governed by a board of directors, associations consist of members with legal obligations and rights, such as voting rights during the annual general meeting. Because of the less democratic organizational structure, which seems to be more practical for their purpose, representative organizations are mostly established as foundations.<sup>43</sup>

At one point, the diversity of representative organizations was said to confuse consumers as to which one to trust and participate in, and the – allegedly – liable parties saw themselves confronted with various opponents that all stated to protect the interests of the class members.<sup>44</sup> This, and media criticism about the performance of certain (board members of) representative organizations, incited a group of practitioners with a proven track record to establish the Claimcode, a self-regulatory initiative. The Claimcode went into effect in July 2011 and lays down general provisions on the good governance of representative organizations, aiming to give consumers more clarity and guarantees on the organizations that act on their behalf and to end their proliferation.<sup>45</sup> It is based on the principle of ‘comply or explain’ and consists of six principles and some explanatory comments on, among other things, the composition, task and remuneration of the organizations’ (supervisory) board. Neither the representative organization nor its (in)direct stakeholders should pursue profit and the board should be independent and avoid conflicts of interest; it should not, for instance, conclude a contract with an entity in which a (supervisory) board member has a stake.<sup>46</sup> The operation of Dutch representative organizations and the effectiveness of the Claimcode will be further discussed in section 6.4.4.2 ff. At this place it is relevant to note that additionally, in 2016, a bill was introduced to improve the corporate governance of, inter alia, associations and foundations.<sup>47</sup> The proposal includes i) clarification of the responsibilities and duties of (supervisory) boards (in short, to act in the interest of the company and its affiliated enterprise), ii) their position in a case of a conflict of interests (in short, to refrain from participating in the debate or decision-making on matters that involve those interests), iii) the possibility to hold board members personally liable in the case of the company’s bankruptcy, and iv) clarification of the rules on their discharge, for instance, if they neglect their duties. As to the liability of board members, under current law, they can already be held personally liable for damages, both jointly and severably; and both internally (towards the company) and externally (towards third parties).<sup>48</sup> However, this requires ‘serious blame’ (*ernstig verwijt*) to be attached to the person(s) held liable, which is generally considered to be a high threshold. There is no such case law within the context of

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<sup>42</sup> Section 2:285(3) BW (foundation) and section 2:26(3) BW (association).

<sup>43</sup> Huls & Van Doorn 2007, p. 54; Lemstra 2009, p. 40. See also section 6.5.4.2.

<sup>44</sup> *Kamerstukken II* 2011/12, 33126, 3, p. 4-5 and 12.

<sup>45</sup> Lemstra & Okhuijsen 2010, p. 160 and 162. The Claimcode is available at <[stichtingservice.nl/wp-content/uploads/2014/07/claimcode-voor-claimstichtingen.pdf](http://stichtingservice.nl/wp-content/uploads/2014/07/claimcode-voor-claimstichtingen.pdf)>.

<sup>46</sup> Principles 2, 4 and 5 of the Claimcode.

<sup>47</sup> *Kamerstukken II* 2015/16, 34491, 3. See, for instance, Blanco Fernández e.a. 2016 and Bartman e.a. 2016.

<sup>48</sup> Sections 2:9 BW (internal liability) and 6:162 BW (external liability).

collective redress. In section 6.5.4.2, I will return to the discharge of board members when discussing a recent example thereof within the context of collective redress.

The (supervision of) Dutch financial markets is governed by the Financial Supervision Act (*Wet op het financieel toezicht*, Wft). The financial markets authority AFM is responsible for authorizing financial enterprises and supervising compliance with, inter alia, the Wft. A legal services provider might be qualified as a financial enterprise and be required to operate under a licence if the nature of its advice and/or intermediary services gives rise to such authorization.<sup>49</sup> For instance, in 2009, the AFM stated that some representative organizations that were active in the DSB case might be regarded as providers that required a licence.<sup>50</sup>

Third-party litigation funding is still in its infancy in the Netherlands. Currently, there are three active funders: Liesker Legal (as of 2011), Redbreast (as of 2015) and Capaz (as of 2016).<sup>51</sup> So far, litigation funding has remained unregulated and unsupervised. General civil law applies to the funding arrangement, which will be discussed hereafter in section 6.4.3.

### **6.3 Litigation costs and costs shifting**

#### **6.3.1 Introduction**

Two key factors of civil litigation are its costs and the way they are shifted between parties at the end of litigation. These factors are part of the litigation risk and are thereby highly relevant, possibly even crucial for the decision to pursue a claim in court or dealing with the dispute otherwise.<sup>52</sup> In the following, I will discuss the main principles regarding these two factors, and some related topics.<sup>53</sup>

#### **6.3.2 Litigation costs**

In the Netherlands, both claimant(s) and defendant(s) pay court charges, save in cases before the sub-district court, where only claimants pay court charges.<sup>54</sup> The charges are statutorily fixed and are linked to categorized amounts in dispute.<sup>55</sup> Thus, they are predictable in advance. They have to be paid in advance; a case will not be considered otherwise.<sup>56</sup> The charges are capped; for 2017, at € 3,894 for claims larger than € 100,000.<sup>57</sup> In 2011, a proposal for cost-based court fees ('the polluter pays') met with such fierce criticism that it was withdrawn in 2013.<sup>58</sup> Within the context of collective redress, it is

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<sup>49</sup> Pursuant to section 1:1 in conjunction with sections 2:75-2:85 Financial Supervision Act.

<sup>50</sup> See *Aanhangsel Handelingen II* 2009/10, 1243, p. 2641-2642 and, for instance, <volkskrant.nl/vk/nl/2680/Economie/article/detail/362397/2009/11/23/AFM-DSB-clubs-opereren-buiten-de-wet.dhtml>.

<sup>51</sup> In the past, some similar parties were active; see Kortmann 2009, p. 790, Tuil 2010, p. 408, Van Almelo 2012, p. 29-31.

<sup>52</sup> See, for instance, Velthoven & Klein Haarhuis 2010, p. 202.

<sup>53</sup> See, more elaborately, De Jonge-Wiemans 2007, Tuil 2010 and Croes & Van Os 2012.

<sup>54</sup> Sections 3(1) and 4(1)(b) Wgbz.

<sup>55</sup> See Table VIII in section 6.3.4. For 2017, see *Stcrt.* 2016, 67519.

<sup>56</sup> Sections 127a and 282a Rv and section 3(3) Wgbz.

<sup>57</sup> These are the district court charges; for appellate cases, the cap is set at € 5,200, and for an appeal in cassation at € 6,504. For the sub-district court, the cap is set at € 939 for cases with a value over € 12,500.

<sup>58</sup> *Kamerstukken II* 2012/13, 33071, 11.

relevant to note that when numerous individual claims are bundled into one action, each claim will still be individually examined and the court might deal with the claims differently as the law and facts indicate.<sup>59</sup> Normally, if the claimants are represented by the same attorney and issue an identical statement, the amalgamated amounts in dispute dictate the amount of the court charges.<sup>60</sup> However, if the individual claims result in different defence strategies, the court might split the action into separate ones and require each claimant to pay those court charges based on its individual amount in dispute.<sup>61</sup>

Attorney fees form the largest portion of civil litigation costs. Although it is difficult to generalize, they approximately make up 70 to 90% of the overall litigation costs.<sup>62</sup> There are several types of attorney remuneration. For a long time the most common one has been the hourly rate.<sup>63</sup> Such a fee is freely negotiable, as long as the charged fee is 'reasonable in light of the circumstances'.<sup>64</sup> In practice, the rates vary significantly, depending on the experience and specialization of the attorney and/or the nature or complexity of the case. Estimates on fee rates have been made, but the outcomes vary considerably.<sup>65</sup> In 2012, Croes and Van Os reported that the average hourly rate was € 173 for a starting attorney and € 471 for a partner in a law firm. They noted, however, that more specific information on the fees actually charged was unavailable.<sup>66</sup> Nowadays, Dutch attorneys are increasingly experimenting with alternative types of remuneration, such as fixed fees for a particular case, project or period.<sup>67</sup> Attorneys enter into such a fee arrangement with repeat players such as banks and legal expenses insurers; empirical research shows that they are less inclined to do so with consumers and SMEs.<sup>68</sup> In civil cases, standard activities aside, attorneys find it difficult to accurately predict the time investment, and some state that fixed fees demotivate such clients to accurately and orderly provide the documents that are necessary to pursue the claim. The study also shows that price and quality competition between Dutch attorneys is low, and that they have a competition advantage over other legal services providers as consumers are not always aware whether legal representation is indeed required.<sup>69</sup> Some respondents note that attorneys are generally conservative and innovative business

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<sup>59</sup> On this method to obtain collective redress, joinder or consolidation, see section 6.5.1.

<sup>60</sup> Sections 3(1) and 15(1) Wgbz.

<sup>61</sup> See Rb. Utrecht 17 December 2008, ECLI:NL:RBUTR:2008:BG7280 (*Beursklacht/Defam*), consideration 4.9.2.

<sup>62</sup> De Jonge-Wiemans 2007, p. 14.

<sup>63</sup> See Tuil 2010, p. 413.

<sup>64</sup> Pursuant to section 25(1) Code of conduct.

<sup>65</sup> See for an overview Croes & Van Os 2012, p. 18.

<sup>66</sup> Croes & Van Os 2012, p. 19-20.

<sup>67</sup> See Winter e.a. 2015, p. 31 ff. See also the data provided by the Rabobank, available at <rabobankcijfersentrends.nl/index.cfm?action=branche&branche=Advocatenkantoren>.

<sup>68</sup> Winter e.a. 2015, p. 31, 34 and 36.

<sup>69</sup> Winter e.a. 2015, p. 37-38 and 90.

models are still lacking.<sup>70</sup> Third and finally, an attorney fee might be a result-based one, in the form of a conditional or contingency fee. These types of remuneration will be addressed in section 6.4.2.

In addition to court charges and attorney fees, litigation costs in summons proceedings can include bailiff fees and witness and/or expert costs, which are all statutorily limited.<sup>71</sup> With regard to witness and expert costs, in practice, parties often negotiate a higher rate.<sup>72</sup>

### 6.3.3 Security for costs

In a case of doubt concerning a claimant's solvency and its potential (in)capacity to pay a costs order, there are two provisions in Dutch law that permit a court to order the claimant to provide security for the potential costs order (*proceskostenzekerheid*), should the opposing party so request. One applies to claimants without a domicile or permanent residence in the Netherlands, the other to consumer organizations that bring a 6:240 BW collective action (the assessment of general conditions).<sup>73</sup> Both options are strictly regulated, and the courts allow them only exceptionally. Many treaties exclude the possibility to obtain such security from a foreigner, which renders the rule somewhat feeble. As to the 6:240 BW collective action, this action is only sporadically lodged, and published case law shows no usage of the security for costs rule.

Some have suggested enlarging the scope of this rule, that is, to require any claimant to deposit a security for costs, as – allegedly – a costs award is often irrecoverable.<sup>74</sup> In light of section 6 ECHR, such a general rule might be difficult to implement or enforce.

In spite of the inapplicability of the aforementioned rules, one entrepreneurial party has provided security for costs in two collective redress cases, in order to address a potential costs award.<sup>75</sup> This may have been incited by the fact that the defendants had contested the vehicle's business model. In the recently proposed collective action for damages, a security for costs rule is not included – which might be related to the generally relatively low costs order in the Netherlands.<sup>76</sup> This brings me to the costs shifting system.

### 6.3.4 Costs shifting

In the Netherlands, too, at the end of litigation the losing party has to reimburse the winning party's litigation costs.<sup>77</sup> The rule was implemented to guarantee access to justice while preventing abusive

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<sup>70</sup> Winter e.a. 2015, p. 37.

<sup>71</sup> On bailiff expenses, see *Stb.* 2001, 325 (Besluit tarieven ambtshandelingen gerechtsdeurwaarders), and for witnesses and experts, see *Stb.* 2010, 727 (Besluit griffierecht burgerlijke zaken), section 2, which refers to *Stb.* 2003, 330 (Besluit tarieven in strafzaken 2003).

<sup>72</sup> Tuil 2010, p. 413.

<sup>73</sup> Sections 224 Rv respectively 1006 Rv. On the latter, see *Kamerstukken II* 1981, 16983, 1-3, p. 71.

<sup>74</sup> See Harreman & Tuil 2003, p. 57, Heemskerk 2004, p. 207-208, and Van Schaick 2016, no. 203.

<sup>75</sup> See Rb. Den Haag 17 December 2014, ECLI:NL:RBDHA:2014:15722 (*CDC/Shell e.a.*) and Rb. Amsterdam 10 May 2017, ECLI:NL:RBAMS:2017:3166 (*CDC/Kemira*). See also section 6.5.3.

<sup>76</sup> See Tillema 2014, p. 338.

<sup>77</sup> Section 237 Rv.



litigation; costs would have to be distributed between parties in a manner in which ‘procedural risk and policy are taken into consideration’:

*‘over partijen te verdelen op een wijze waarbij aan overwegingen van procesrisico en procesbeleid mede betekenis wordt toegekend, onder meer om te voorkomen dat de voormelde vrijheid door de vrees voor een veroordeling tot omvangrijke proceskosten in gevaar zou worden gebracht.’<sup>78</sup>*

As litigation cannot be considered a tort, a costs award is neither damages nor a fine, but rather a principle of ‘fairness’.<sup>79</sup>

In addition to the costs order, a court can award the prevailing party its extrajudicial costs (*buitengerechtelijke kosten*) as patrimonial damage (*vermogensschade*). These costs are those incurred in the pre-trial phase, and include costs that result from determining damage and – tortious or contractual – liability, and costs from obtaining extrajudicial payment.<sup>80</sup> This indemnification aims to put the aggrieved party in the hypothetical position he would have been in had the injurious event not occurred,<sup>81</sup> and can concern attorney fees, expert costs and debt collection costs.<sup>82</sup> Extrajudicial costs are awarded if i) the defendant can be held liable for these costs,<sup>83</sup> ii) the court deems both the amount of the costs and the fact that they have been incurred to be reasonable (*dubbele redelijkheidstoets*),<sup>84</sup> and iii) the costs do not fall under the scope of the costs order – see hereafter.<sup>85</sup> If awarded, the reasonably incurred costs that result from determining damage and liability are fully shifted to the liable party. Debt collection costs are generally reimbursed in accordance with statutorily fixed rates.<sup>86</sup>

In spite of the loser pays rule, the Dutch costs shifting system cannot be considered to be a full English rule, since the losing party is not required to reimburse all of the prevailing party’s actual litigation costs – exceptions aside, see hereafter and the full indemnity costs shifting rule in intellectual property cases.<sup>87</sup> Normally, bailiff, witness and court-appointed expert costs as well as court charges will be fully covered – unless parties have negotiated a higher rate than the statutorily fixed one.<sup>88</sup> Attorney fees, however, are generally not fully shifted and, consequently, the costs award does not – necessarily

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<sup>78</sup> See *Kamerstukken II* 1980-81, 16593, 3, p. 8.

<sup>79</sup> See Haardt 1945, p. 14, Cleveringa 1972, p. 367 ff, Wesseling-van Gent, Minkjan & Holzhauer 1993, Sluijter 2011, p. 45 ff, and Numann 2013. See also HR 27 June 1997, *NJ* 1997, 651 and HR 18 February 2005, *NJ* 2005, 216.

<sup>80</sup> Section 6:96(2)(b) and (c) BW, which has codified HR 3 April 1987, *NJ* 1988, 275, m.nt. C.J.H. Brunner (*London/Drenth*). See, for instance, Lindenberg 2016.

<sup>81</sup> HR 26 September 2014, ECLI:NL:HR:2014:2797 (*De Jonge/Scheper Ziekenhuis*).

<sup>82</sup> *Kamerstukken II* 1975-76, 7729, 6-7, p. 90.

<sup>83</sup> Section 6:95 BW. Causation between the injurious event and these costs is required, actually incurred loss resulting from the injurious event is not necessary; see HR 11 July 2003, ECLI:NL:HR:2003:AF7423 and HR 13 March 2015, ECLI:NL:HR:2015:586.

<sup>84</sup> The court can moderate the costs; see sections 6:101 and 6:109 BW and section 242 Rv.

<sup>85</sup> Sections 6:96(3) BW and 241 Rv. See, for instance, De Bock 2015a and Lindenberg 2016.

<sup>86</sup> *Stb.* 2012, 141 (*Besluit vergoeding voor buitengerechtelijke incassokosten*), see section 2(1) and (2).

<sup>87</sup> Section 1019h Rv, which has implemented the IP Enforcement Directive 2004/48/EG, section 14. See, for instance, Vrendenburg 2017.

<sup>88</sup> See section 6.3.2.

– reflect the prevailing party’s actual litigation costs. The extent to which the fees are shifted depends on how the costs are qualified. The extrajudicial costs that fall under the scope of the costs order include the attorney fees that relate to case instruction (such as the gathering of facts and evidence, and legal analysis) and preparation (such as ordering and selecting documents and drawing up a summons).<sup>89</sup> These costs ‘change colour’ as soon as litigation is commenced; they are no longer considered to be extrajudicial costs, but costs for the recoverability of which the costs order rules apply.<sup>90</sup> The distinction is relevant, because the reimbursable attorney fees under a costs order are calculated on a flat-rate basis. The rates (*Liquidatietarief*) are linked to categorized amounts in dispute, and the reimbursable fee furthermore depends on the number of procedural actions taken.<sup>91</sup> Just as court charges, the rates are capped; since 2004, the maximum rate is € 3,211 per procedural action (see Table VIII hereafter). Although attorney fee rates vary, as a result of this system it is unlikely that the attorney fees are fully shifted. The recoverable amount has been said to vary between 25 to 90 per cent.<sup>92</sup>

The *Liquidatietarief* is a non-binding guideline for courts, established by the judiciary and the Bar Association. In practice, normally the guideline is followed.<sup>93</sup> Judges can deviate from it, but a deviation in the sense of full costs shifting requires thorough reasoning and circumstances that justify such deviation.<sup>94</sup> Full costs shifting can take place through a substantive claim for damages based on an abuse of (procedural) law or tort.<sup>95</sup> For instance, if the claim should not have been brought, given its clear lack of merits.<sup>96</sup> Full(er) costs shifting can also occur after undue litigation conduct by the losing party. The court will assess whether the costs were reasonably incurred and the culpability of the litigants’ behaviour, such as delaying the proceedings,<sup>97</sup> or infringing the obligation to (truth)fully state all facts that are relevant to the judgment.<sup>98</sup>

There are three exceptions to the regular costs shifting rule. The court normally does not shift costs in family law cases, if both parties are partly successful, or if the court deems that the costs have been

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<sup>89</sup> Section 241 Rv; see also HR 14 January 2005, ECLI:NL:HR:2015:AR2760.

<sup>90</sup> See critically, for instance, Van Dijk 2006.

<sup>91</sup> See <[rechtspraak.nl/Voor-advocaten-en-juristen/Reglementen-procedures-en-formulieren/Civil/Paginas/Liquidatietarief.aspx](https://rechtspraak.nl/Voor-advocaten-en-juristen/Reglementen-procedures-en-formulieren/Civil/Paginas/Liquidatietarief.aspx)>.

<sup>92</sup> Tuil 2010, p. 415.

<sup>93</sup> See <[rechtspraak.nl/Voor-advocaten-en-juristen/Reglementen-procedures-en-formulieren/Civil/Paginas/Liquidatietarief.aspx](https://rechtspraak.nl/Voor-advocaten-en-juristen/Reglementen-procedures-en-formulieren/Civil/Paginas/Liquidatietarief.aspx)>. See also Huydecoper 2007.

<sup>94</sup> See *Kamerstukken II* 1980-81, 16593, 3, p. 8 and Sluijter 2011. See also, for instance, HR 3 April 1998, *NJ* 1998, 571 (*Lindeboom/Beusmans*) and HR 20 March 2009, ECLI:NL:HR:2009:BG7995.

<sup>95</sup> Section 3:13 BW respectively section 6:162 BW. See, for instance, Hof Leeuwarden 3 August 2010, ECLI:NL:GHEE:2010:BN3290, HR 6 April 2012, ECLI:NL:HR:2012:BV7828.

<sup>96</sup> HR 29 June 2007, ECLI:NL:HR:2007:BA3516.

<sup>97</sup> HR 20 March 2009, ECLI:NL:HR:2009:BG7995. See also De Bock 2015a.

<sup>98</sup> Section 21 Rv. See Sluijter 2011 and Tillema 2011. See also, for instance, Rb. Den Haag 1 March 2017, ECLI:NL:RBDHA:2017:3426.

unreasonably incurred (*nodeloos veroorzaakt*).<sup>99</sup> The court that has dealt with the case will make the costs award; there are no specialized costs judges or officers.

Table VIII provides some examples of a Dutch claimant's litigation risk as in the adverse costs order, which is added to the claimant's own litigation costs. For instance, if the amount in dispute is € 30,000, and the defendant has undertaken four procedural actions (3,5 points according to the *Liquidatietarief*),<sup>100</sup> the court will order a costs award of € 3,951 in favour of the defendant. The defendant will have to bear any remaining costs that he has incurred.

	€ 3,000	€ 30,000	€ 300,000	€ 3,000,000	€ 30,000,000	€ 300,000,000	Indefinite
<b>Court charges district court</b>	-- <sup>101</sup>	1,924	3,894	3,894	3,894	3,894	618
<b>Liquidated attorney's fee</b>	(384*3,5=) 1,344	(579*3,5=) 2,027	(2.000*3,5=) 7,000	(3.211*3,5=) 11,239	(3.211*3,5=) 11,239	(3.211*3,5=) 11,239	(452*3,5=) 1,582
<b>Total</b>	1,344	3,951	10,894	15,133	15,133	15,133	2,200

Table VIII: The claimant's cost risk (adverse costs order) in the Netherlands<sup>102</sup>

The recent legislative proposal for a collective action for damages includes a one-way, full indemnity costs shifting rule in favour of the representative organization(s). This rule, as well as the cost rule for a WCAM settlement, will be discussed in section 6.5. Currently, the regular cost rules apply in collective actions. In that respect, it is important to reiterate that it is not yet possible to claim for damages in such an action and that most claims are aimed at obtaining a declaratory judgment.<sup>103</sup> This renders the amount in dispute indefinite, and consequentially, one of the lowest rates in the *Liquidatietarief* applies (see Table VIII, final column). However, as mentioned, a court can award damages or deviate

<sup>99</sup> See, for instance, HR 23 March 1979, *NJ* 1980, 125, HR 23 January 1987, *NJ* 1987, 962, HR 5 June 1987, *NJ* 1988, 41, and HR 5 October 2001, ECLI:NL:HR:2001:ZC3694. See also Wesseling-van Gent, Minkjan & Holzhauer 1993, p. 3-4, Van der Aa & Sluijter 2009, p. 2480-81, Tuil 2010, p. 416, and Sluijter 2014, p. 48-49.

<sup>100</sup> A statement of defence, a motion, an appearance before the court, and a last written statement.

<sup>101</sup> Defendants do not pay court charges at the sub-district court; section 4(1)(b) Wgbz.

<sup>102</sup> The calculations are based on the court charges and *Liquidatietarief* in 2017, for civil cases at the (sub) district court (for appellate courts, the court charges deviate – i.e. they are larger), and a legal entity as a defendant (for natural persons, the court charges are lower). See <rechtspraak.nl/Uw-Situatie/Onderwerpen/Kosten-rechtszaak/Griffierecht/Paginas/Griffierecht-kanton.aspx>, <rechtspraak.nl/Uw-Situatie/Onderwerpen/Kosten-rechtszaak/Griffierecht/Paginas/Griffierecht-civiel.aspx> and <rechtspraak.nl/Voor-advocaten-en-juristen/Reglementen-procedures-en-formulieren/Civiel/paginas/liquidatietarief.aspx>. It is important to note that the table demonstrates the claimant's cost risk, *not* its actual litigation costs, and that it does not include other costs such as expert costs. The calculation is based on a complex case, with 3,5 'litigation points' on the costs order scale (statement of defence, a motion, appearance before the court and a last written statement).

<sup>103</sup> See section 2.2.4 and, hereafter, section 6.5.3.

from the *Liquitatie*tarief. Occasionally, courts have found a reason to do so in the complexity and inherent costs of the specific collective action. In one, the costs award (as to the attorney fees) for the prevailing representative organization was uplifted by way of awarding the *Liquidatie*tarief's maximum instead of minimum rate.<sup>104</sup> This resulted in reimbursable attorney fees of € 12.840 instead of € 1.808. In another collective action, the court – creatively – qualified part of the representative organization's attorney fees as (reasonably incurred) extra-judicial costs that did not fall under the scope of the costs order.<sup>105</sup> This resulted in an 'additional' award for attorney fees of € 31.833,28.

A recent case law study has shown that full indemnification of the defendant due to the representative organization's undue litigation conduct or abuse of procedural right (see before) rarely occurs in collective actions:<sup>106</sup>

*'I found 10 unique cases in which one of these grounds was invoked by the defendant (n=400). In only one of these cases did the court indeed find an infringement. That case involved an entrepreneurial representative organization that had filed a claim that was the same as a claim that had been previously filed (and dismissed, due to a technicality). Given the close affinity between both claimants (the 'new' organization had changed its name slightly) and the fact that no new points of law were raised, the court of appeal found that the 'new' organization had abused its procedural right to litigate, and ordered it to pay the defendant's actual litigation costs of both instances for the 'second' claim (€25,853).'*

### 6.3.5 Recovery of litigation funding costs

The pursuit of collective redress can be a costly endeavour, particularly as to the attorney fees and, if incurred, expert costs. The funding routes will be discussed in section 6.4. Here, I will discuss whether claimants can recover litigation (funding) costs from their opponent(s) in the case of success.

First, any representative organization might be able to recover its (reasonably incurred) extrajudicial costs that result from determining damage and liability. The costs that are recovered through the adverse costs order already fall to the representative organization as the (prevailing) claimant. In addition, it may have incurred extrajudicial costs not covered by the costs order. A claim for such costs, however, falls to the individual claim owner.<sup>107</sup> Consequentially, the liable party cannot be held liable for this damage towards the claimant in a collective action, the representative organization. Nevertheless, in 2006, the Supreme Court ruled that a prevailing representative organization can claim as damages its extrajudicial costs that result from determining damage and liability, even though the wrongdoer is not liable for these costs towards the representative organization.<sup>108</sup> According to the Supreme Court, the representative organization can effectively settle mass damage in the aggrieved

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<sup>104</sup> Rb. Den Haag 24 June 2015, ECLI:NL:RBDHA:2015:7145 (*Urgenda*), consideration 4.110. See also Tillema 2016.

<sup>105</sup> Rb. Noord-Nederland 2 September 2015, ECLI:NL:RBNNE:2015:4185 (*WAG/NAM*), considerations 4.5.4-4.5.7. See also Tillema 2016.

<sup>106</sup> Tillema 2017, p. 235 ff.

<sup>107</sup> Such a claim does not fall under the excluded claim for damages under section 3:305a(3) BW, see Frenk 1994, p. 163 ff.

<sup>108</sup> HR 13 October 2006, ECLI:NL:HR:2006:AW2077, AW2080 and AW2081.

parties' interest by way of a collective action, and the individual aggrieved parties would be able to claim such damages in individual litigation. Thus, a 'reasonable interpretation' of section 6:96(2)(b) BW in conjunction with section 3:305a BW should result in the indemnification of the representative organization. Some have argued that this line of reasoning can also be applied to recover extrajudicial costs that have been incurred in the build-up to a WCAM settlement.<sup>109</sup> To compensate costs for determining liability might appear odd when combined with a 'without prejudice' clause that is often included in such a settlement, but this has not prevented parties from doing so in practice.<sup>110</sup>

Second, under certain circumstances, individual claimants might be able to recover a contingency fee (the percentage of the proceeds) that is due to the entrepreneurial party. It is plausible that this fee not only compensates the entrepreneurial party for (pre-financing) its litigation costs, but equally covers its risk of not being remunerated at all. What the fee specifically covers might not be explicitly arranged.<sup>111</sup> Thus, in the past, some argued that courts will probably not allow a prevailing claimant to recover from the opponent this percentage instead of the concrete extrajudicial costs based on hourly billing.<sup>112</sup> However, in 2014, the Supreme Court opened the way for qualifying the percentage as reasonably incurred extrajudicial costs under section 6:96(2)(b) and/or (c) BW.<sup>113</sup> In the case at hand, a personal injury case, the opponent initially had denied liability, the aggrieved party was not capable of bearing the hourly attorney fees, and furthermore had argued that the specific percentage (15%) was common practice. The Supreme Court ruled that in light of the rationale of the provision (to place the aggrieved party in the position he would have been in had the injurious event not occurred) it might be justified to recover the contingency fee, and that courts need to consider all of the circumstances when assessing the reasonableness of (such) extrajudicial costs. Van Boom has argued that this judgment gives the Dutch courts – a marginal yet desirable – leeway to assess the reasonableness of the contingency fee arrangement.<sup>114</sup> Such court control, however, might also render this reasonableness unpredictable, thereby inciting entrepreneurial parties to place the risk of judicial interference on the aggrieved party.<sup>115</sup> Lindenbergh therefore advocates practical guidelines along the lines of those for the experiment with attorney contingency fees (discussed hereafter in section 6.4.2). Such (self-)regulation has not yet been implemented.

It is important to emphasize that the aforementioned case concerned a personal injury claim and that the parties had settled rather than litigated. This is relevant as, generally, the extrajudicial costs (as to the attorney fees) would be covered by the adverse costs order (*Liquidatietarief*).<sup>116</sup> Moreover, for

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<sup>109</sup> See Frenk 2007, under 1.4, Schonewille 2007, Tillema 2016a, p. 98 ff, and Tillema 2017, p. 240.

<sup>110</sup> See also section 6.5.6.2.

<sup>111</sup> See, for instance, Rb. Overijssel 1 November 2016, ECLI:NL:RBOVE:2016:4203.

<sup>112</sup> See also Bauw e.a. 1999, p. 29.

<sup>113</sup> HR 26 September 2014, ECLI:NL:HR:2014:2797 (*De Jonge/Scheper Ziekenhuis*). See, for instance, Hebly 2014, Engberts 2015, Van Boom 2015, and Lindenbergh 2015.

<sup>114</sup> Van Boom 2015, p. 18.

<sup>115</sup> Lindenbergh 2015, under 6.

<sup>116</sup> As mentioned, this differs in intellectual property cases; there, a full costs shifting rule applies. In one such case (no mass damage event), the Supreme Court recently deemed acceptable the recovery of a – modest – success fee (an

collective redress, case law on the matter has yet to take shape. Since 2014, some district courts have ruled on a contingency fee in individual cases that followed a mass damage event (the Dexia affair).<sup>117</sup> The outcomes vary. In some cases, a district court has allowed the recovery of extrajudicial costs that were incurred to obtain extrajudicial payment (summons, settlement negotiations, issuing the opt-out statement, et cetera), even though most of these activities may have followed a repeated pattern as the lawyer represented numerous other aggrieved parties with similar claims. However, as the contingency fee arrangement did not specify which costs it concerned, the recovery thereof was rejected and the costs were awarded in accordance with the statutorily fixed tariff.<sup>118</sup> In other cases, the extrajudicial costs (contingency fees) were rejected based on the legal grounds of the claim: as opposed to tortious or contractual liability, undue payment following the nullification of a contract cannot lead to awarding those extrajudicial costs that relate to determining liability and damage.<sup>119</sup> In one case, the (same) district court ordered the claimant to demonstrate the reasonableness of the agreed percentage (30%), also in light of the fact that its lawyer represented numerous other aggrieved parties with similar claims. The court ruled that it would be unreasonable to hold the opponent liable for a contingency fee that substantially exceeds the amount of hours spent, even though it might be difficult to specify the costs of all individual clients. In these circumstances, a comparison between a contingency fee outcome and the hours spent was deemed reasonable.<sup>120</sup>

### 6.3.6 Liability for adverse costs

The losing party is liable for the adverse costs order. In the exceptional circumstance that this party is non-existent or has not had the authority to instruct the attorney to litigate, the attorney can be held liable for the costs order.<sup>121</sup> A collective action pursuant to 3:305a BW only binds the representative organization (and the defendant); an adverse costs order thus does not affect the class members – unless the organization and class members have contractually arranged otherwise.

For collective redress through bundled claims, it depends on the construction of aggregation. Under Dutch law, the person entitled to bring a claim is not necessarily the original creditor of the obligation. A distinction can be made between the party whose rights or obligations are in dispute (*materiële procespartij*) and the litigant responsible for the procedural actions and decisions (*formele procespartij*).<sup>122</sup> This distinction is not a mere academic obscurity, because two different parties can each fulfil one of the roles. Depending on the underlying arrangement, the entrepreneurial party might bind class

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uplift to the normal tariff in the case of success in an appeal in cassation) as part of the costs order; see HR 13 November 2015, ECLI:NL:HR:2015:3304.

<sup>117</sup> More specifically, the cases concern those individuals that opted out of the WCAM settlement. On this case, see also section 6.5.6.2.

<sup>118</sup> Rb. Overijssel 1 November 2016, ECLI:NL:RBOVE:2016:4203.

<sup>119</sup> Rb. Zeeland-West-Brabant 24 August 2016, ECLI:NL:RBZWB:2016:6242; Rb. Zeeland-West-Brabant 31 August 2016, ECLI:NL:RBZWB:2016:5388, Rb. Zeeland-West-Brabant 7 September 2016, ECLI:NL:RBZWB:2016:5983, and Rb. Zeeland-West-Brabant 3 May 2017, ECLI:NL:RBZWB:2017:2516.

<sup>120</sup> Rb. Zeeland-West-Brabant 10 August 2016, ECLI:NL:RBZWB:2016:5217.

<sup>121</sup> Section 245 Rv. See also Sluijter 2011, p. 57.

<sup>122</sup> See, for instance, the opinion of the Advocate General of the Supreme Court of 15 December 2006 ECLI:NL:PHR:2006:AZ1496, consideration 2.5 ff, with further references.

members concerning the adverse costs award, even though the latter were not (formal) parties to the proceedings. Three types of legal construction can be distinguished.<sup>123</sup> In the case of bundled assignments (*cessie* pursuant to section 3:83 BW in conjunction with section 3:94 BW), the entrepreneurial party has become the claim owner and acts as a litigant, and is thus liable for the adverse costs order. In the case of bundled mandates (*lastgeving* pursuant to section 7:414 BW), the entrepreneurial party is contractually bound to collect the debt and, if necessary, to pursue the claim in court. The arrangement can include an agreement that, although the rights of the claim owner are in dispute, the entrepreneurial party acts in its own name and on its own account. The entrepreneurial party is then liable for the costs order as a formal and substantive party.<sup>124</sup> If the entrepreneurial party acts in the name of the class members based on powers of attorney (*volmacht* pursuant to section 3:60 BW), the attorney is not considered to be litigant; its actions are attributed to the class members.<sup>125</sup> They remain ‘substantive party’ to the proceedings and, thus, are liable for the adverse costs order. In all three situations, the contractual arrangement between the entrepreneurial party and individual class members might stipulate who, in the end, bears which costs in the relation between the entrepreneurial party and the class member. For entrepreneurial parties that operate under a contingency fee arrangement, this will most likely be the entrepreneurial party. However, if the entrepreneurial party is not the claimant, such as a third-party litigation funder, it is not likely that the defendant can hold this party liable for the adverse costs order, that is, the cost rules do not enable the defendant to widen the scope of liability.

## 6.4 Private litigation funding

### 6.4.1 Introduction

As in many other jurisdictions, the availability of public legal aid funding in the Netherlands remains under pressure. Parties with limited financial means can apply for the funding of (a share of the) legal expenses.<sup>126</sup> The number of legal aid subsidies (*toevoegingen*) was annually increasing between 2000 and 2014; however, as of then, the number has been declining,<sup>127</sup> and public legal aid continues to be subject to cutbacks.<sup>128</sup> Consequently, the topic of private litigation funding has gained in importance. In the following, I will discuss the legal basics of private litigation funding by attorneys, third-party litigation funders and special purpose vehicles – the operation of these entrepreneurial parties within the context of collective redress will be further discussed in section 6.5. As mentioned, legal expenses insurers have taken up a significant part of the Dutch legal services market. As these insurances are mainly relevant within the context of ‘regular’ dispute resolution, they will not be discussed in detail; however, they will be addressed in section 6.5.6.2 within the context of a WCAM settlement.

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<sup>123</sup> See also sections 6.4.4.1 and 6.5.3.

<sup>124</sup> Hof Den Haag 18 April 2006, ECLI:NL:GHSGR:2006:AZ3212.

<sup>125</sup> See Biemans 2011, p. 118, with further references.

<sup>126</sup> Section 18(2) Dutch Constitution (*Grondwet*) in connection with sections 12 and 34 Legal Aid Act (*Wet op de rechtsbijstand*).

<sup>127</sup> Peters, Van Gammeren-Zoetewij & Combrink-Kuiters 2016, p. 69.

<sup>128</sup> Such as an increase in the individual’s own contribution, raising the threshold for claim controversy or the type of case applicable for funding, and adjustments in the reimbursability of attorney fees. See, for instance, *Kamerstukken II* 2013/14, 31753, 64 and, for a brief history on subsidized legal aid in the Netherlands, Wolfsen 2015, p. 40 ff.

#### 6.4.2 Attorney litigation funding

Dutch attorneys are allowed to operate under a conditional fee, that is, to charge a fixed fee or an hourly, basic (cost-effective) fee and increase it with a 'bonus' fee or a percentage of the proceeds in the case of success.<sup>129</sup> As mentioned, attorneys are restricted from offering litigation funding by way of a contingency fee arrangement, that is, a 'no cure, no pay' arrangement combined with a percentage of the proceeds (*quota pars litis*).<sup>130</sup> The government does not allow such a construction in cases other than mere debt collection, fearing that this might endanger the attorney's independence and integrity.<sup>131</sup> However, since 2014, a 5-year pilot scheme has been in operation that, under strict circumstances, allows a 'no win, no fee' arrangement in personal injury cases: the attorney receives an 'upgraded' hourly fee in the case of success (success fee), and nothing if the case is unsuccessful.<sup>132</sup> The underlying idea is to improve access to justice for personal injury victims who are not eligible for subsidized legal aid.<sup>133</sup> One of the key elements of the experiment is that the arrangement is only allowed if the opponent has not recognized liability and/or causality between liability and (the extent of) the damage is unclear. Furthermore, the percentage of the success fee is maximized at 100% of the regular hourly fee, with a cap of 25% of the proceeds (variant A), or the percentage of the success fee is maximized at 150% and the cap is set at 35% of the proceeds (variant B).<sup>134</sup> Depending on the variant, the client bears the litigation costs other than the attorney fees (variant A), or the attorney bears these costs, but only in the case of loss (variant B). After five years, the government will decide whether or not to enact the provisional regulation into legislation. Attorneys that take part in the pilot scheme need to register at the local Bar Association and provide data for the evaluation. Recently, it was reported that due to the large financial risks few attorneys have made use of this possibility (64 arrangements were reported).<sup>135</sup> In the recent legislative proposal for a collective action for damages, the minister reaffirmed his intention not to further allow contingency fees for attorneys, as they potentially affect attorneys' independence.<sup>136</sup>

Some attorneys have been accused of circumventing the ban on contingency fees. For instance, in 2010, the Disciplinary Court of Appeal had to rule in a case in which a personal injury victim had assigned her claim for damages to a third-party as she could no longer afford to pay her attorney. The contract entailed that the funder would receive 40% of the proceeds in the case of success. Furthermore, the claim would be reassigned if the client turned down a settlement offer, with the obligation to repay the funder's costs so far incurred plus the proceeds that the funder would have obtained had the case been settled. The client's attorney had recommended this funder, with whom he had close

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<sup>129</sup> See Hof van Discipline 10 November 1997, no. 2589, *Advocatenblad* 30 April 1999, p. 514, and Hof van Discipline 9 February 1998, no. 2474, *Advocatenblad* 19 March 1999, p. 346 – see also hereafter.

<sup>130</sup> Section 7.7(1) Regulations for attorneys and section 25(2) and (3) Code of conduct; in line with section 3.3 of the Code of Conduct for Lawyers in the European Union.

<sup>131</sup> See *Stb.* 2005, 123, p. 6. See also Faure, Hartlief & Philipsen 2006, p. 26 ff.

<sup>132</sup> Directive of the Dutch Bar Association (*Verordening to wijziging van de Verordening op de praktijkuitoefening (onderdeel Resultaatgerelateerde beloning)*), *Stcrt.* 25 juli 2013, no. 20779. See, for instance, Van Boom & De Jong 2014.

<sup>133</sup> See the Explanatory memorandum to the directive, page 4.

<sup>134</sup> Sections 1, 3 and 4 of the Directive.

<sup>135</sup> Knoop, B., 'No cure, no pay slaat niet aan bij letselschadeadvocaat', *FD* 27 March 2017.

<sup>136</sup> *Kamerstukken II* 2016/17, 34608, 3, p. 12.



family ties, as it later transpired. The client then approached the disciplinary court and tried to nullify the assignment before the Amsterdam District Court.<sup>137</sup> The Disciplinary Court of Appeal deemed the attorney's behaviour reprehensible. The construction itself did not infringe the ban on contingency fees, as it was not established that the attorney would receive a part of the percentage (he had invoiced his hourly fees). However, according to the disciplinary court, the attorney had failed to give sufficient and proper advice on obtaining public legal aid and on the consequences of the funding contract. Furthermore, he had advised the funder on the chances of success and a suitable funding construction and had thus jeopardized his independence. The attorney was disbarred for a month. Nevertheless, in the civil case, the funding construction was upheld. The Amsterdam Court of Appeal ruled that since the ban on contingency fees did not apply to the funder, the assignment was not contrary to public policy pursuant to section 3:40 BW, nor otherwise void. Although an excessive percentage could be considered to be contrary to public policy under certain circumstances, the claimant had not sufficiently argued as such.<sup>138</sup>

If a contingency fee arrangement is found to be contrary to public policy, under certain circumstances the arrangement can be converted into a valid one, such as an hourly or conditional fee arrangement.<sup>139</sup>

Within the context of collective redress, little case law has been published on the remuneration of attorneys. I will highlight two notable cases; one recent, one less so. First, in 1997, the Disciplinary Court of Appeal had to rule on the remuneration of an attorney who represented the aggrieved parties of a pyramid scheme.<sup>140</sup> At one point, the number of aggrieved parties that applied for the services of the attorney in question had started to increase (around 700 persons). Hence, he had established an association, of which his clients had to become members and to which they had to pay a fee of Dfl. 250,<sup>141</sup> which was intended to fund two test cases. The attorney would bill the association 85% of his regular fee and would receive 15% of the proceeds in the case of success. At the time of the appeal, the construction had yielded the law firm approximately Dfl. 500,000. The court of appeal deemed the construction to be effective and in light of the circumstances (the sudden adhesion of clients) a reasonable route to serve the interests of 'an unusually large number' of aggrieved parties (at the time of the disciplinary hearing, it had grown to approximately 2,700 clients/members). The court did not consider the construction to be mandatory, as the aggrieved parties were free to participate or not. Furthermore, the construction had attracted a large number of aggrieved parties but none had raised objections against the arrangement. The total earnings of the law firm were deemed substantial but not (yet) excessive, as the amount in dispute in the individual claims (around Dfl. 5,000) was found to be in balance with the individual payment and the law firm had taken on a considerable workload in a

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<sup>137</sup> See Hof van Discipline 11 January 2010, LJN YA0254, *L&S* 2010/14, and Hof Amsterdam 13 December 2011, ECLI:NL:GHAMS:2011:BU8763. See also Van Boom 2012.

<sup>138</sup> See, for instance, Rb. Arnhem 5 April 2006, ECLI:RBARN:2006:AW7225 (on a loan with an excessive interest rate, 1,000%, which was found to be contrary to public policy).

<sup>139</sup> See Rb. Den Haag 16 February 2007, ECLI:RBSGR:2007:AZ8717.

<sup>140</sup> Hof van Discipline 10 November 1997, no. 2589, *Advocatenblad* 30 April 1999, p. 514.

<sup>141</sup> At the current exchange rate, approximately € 113.

short period of time. Nevertheless, the court ruled that the law firm would have to consult the association on a reasonable distribution of the proceeds, should the percentage of 15% result in even more substantial earnings.

A more recent case in point is the collective action that concerns the gas drilling in Groningen, which caused minor earthquakes resulting in damage to homeowners. A foundation has taken it upon itself to hold those involved in the drilling liable for damages.<sup>142</sup> It only represents those homeowners that have entered or will enter into a participation agreement with the foundation and agree to be represented by a specific law firm. Part of the participation agreement is the payment – to the law firm – of a fixed fee (€ 100) and, in the case of success, 5 to 10 % of the proceeds.<sup>143</sup> The percentage is labelled a ‘success fee’, and the construction seems to have the characteristics of the aforementioned – permitted – conditional fee arrangement, as it can be argued that the aggregation of € 100 per class member (in 2015, some 900 members had registered) is likely to approximate the – required – basic (cost-effective) fee for the law firm. Nevertheless, the law firm is currently under scrutiny due to an alleged infringement of the ban on contingency fees. The case is currently pending before the Disciplinary Board, and has once more stirred up the debate on whether or not attorneys should be allowed to agree on contingency fees.<sup>144</sup>

Under certain circumstances, a claim can be assigned to an attorney. Section 3:43 BW states that, among other legal professionals, attorneys cannot acquire property (such as a claim) that is subject to proceedings before a court in the jurisdiction where they exercise their profession.<sup>145</sup> The provision aims to serve the public interest by guaranteeing the legal profession’s integrity; (any appearance of) attorneys’ own interest in the outcome of litigation should be shunned.<sup>146</sup> It is not fully clear whether this provision should be interpreted restrictively or extensively. First, the validity of the assignment depends on the moment of assignment. Pursuant to (the scarce) published case law, the phrasing ‘subject to proceedings before a court’ requires that the case is actually pending before a court; the provision does not apply to claims that have been assigned previous to the action being lodged, even if preparatory activities signal such an intention.<sup>147</sup> Furthermore, the phrasing ‘where they exercise

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<sup>142</sup> See Rb. Noord-Nederland 2 September 2015, ECLI:NL:RBNNE:2015:4185.

<sup>143</sup> The percentage depends on the date of registering with the foundation. In this way, ‘early birds’ are rewarded for contributing to financially enabling the action. On such a ‘reward’, see also section 6.5.6.2.

<sup>144</sup> See, for instance, media reports on the case at <advocatie.nl/dekenbezwaar-tegen-de-haan-om-succesfee-geduperden-aardbevingsschade>, <advocatie.nl/de-haan-wraakt-raad-van-discipline-twee-leden-waren-concurrenten>, <dvh.nl/groningen/Zes-vragen-over-stichting-van-advocatenkantoor-De-Haan-21914676.html>, <fd.nl/ondernemen/1194316/deken-sleept-de-helden-van-groningen-voor-de-rechter?utm\_source=nieuwsbrief&utm\_campaign=fd-ochtendniewsbrief&utm\_medium=email&utm\_content=20170327&utm\_cid=671>.

<sup>145</sup> Property (*goederen*) under section 3:1 BW and acquire (*verkrijgen*) under section 3:80 BW, which includes the assignment of a claim (*cessie van een vorderingsrecht/vordering op naam*) under section 3:94 BW. On assignment of claims, see also section 6.4.4.

<sup>146</sup> *Kamerstukken II* 1984/85, 17496, 10, p. 21.

<sup>147</sup> See Hof Arnhem 22 March 2011, ECLI:NL:GHARN:2011:BQ0938, Hof Den Bosch 15 September 2015, ECLI:NL:GHSHE:2015:3593, and Hof Amsterdam 15 November 2016, ECLI:NL:GHAMS:2016:4639 (setting aside the – unpublished – judgment of the Amsterdam District Court of 5 August 2015, which had ruled that the assignment was

their profession' can – for attorneys – refer to all Dutch courts, or be restricted to the district in which the attorney has registered his practice.<sup>148</sup> The wording of the provision suggests the latter. In light of the provision's rationale and the aforementioned rules on, for instance, professional independence and integrity, it can equally well be argued that it refers to all Dutch courts.<sup>149</sup> However, if argued in this way, it is questionable why the provision does not just state that assignment to an attorney is forbidden, *quod non*. In this context, two provisions of the Code of conduct for attorneys are relevant as well. First, attorneys are not allowed to accept security other than a cash payment as a retainer for the payment of their bills, save in exceptional circumstances and only after consultation with the local dean.<sup>150</sup> Second, an attorney should avoid any misunderstanding about the capacity in which he acts.<sup>151</sup> Thus, there might be a duty to reveal his capacity as a claim owner if a client has assigned its claim to him in combination with a power of attorney to litigate on behalf of the attorney.<sup>152</sup> It is important to emphasize, however, that an infringement of these professional rules does not constitute that the assignment is invalid.<sup>153</sup>

### 6.4.3 Third-party litigation funding

Third-party litigation funding is developing, but is still in its infancy in the Netherlands.<sup>154</sup> As mentioned in section 6.2, third-party funding has remained unregulated and unsupervised; as it is not yet a widespread phenomenon, the legislator's policy has been a *laissez faire* one. Van Boom and Luiten have discussed various qualifications of the contract that underlies third-party funding, such as one of sales, partnership or credit. They conclude that, in all likelihood but depending on the specific stipulations, the contract will be qualified as a contract *sui generis*.<sup>155</sup> Consequentially, no specific regulation applies, other than regular civil law.

So far, the activity of third-party funders in collective redress has been limited. Nevertheless, the legislator's approach slightly differs within this context, as it expects that collective redress is the area in

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invalid since the preparatory activities showed a clear intent to bring the claim; see also Hof Den Bosch 19 January 2016, ECLI:NL:GHSHE:2016:128). See also Kamphuisen 1960, p. 47.

<sup>148</sup> Pursuant to section 12 Attorneys Act.

<sup>149</sup> See Van Mierlo 2016, aant. 9.2, who argues in favour of the 'local' interpretation; similarly, Rb. Amsterdam 14 January 1993, KG 1993, 74 and Hof Arnhem-Leeuwarden 25 June 2013, ECLI:NL:GHARL:2013:4438. Asser/Kamphuisen 1960, p. 47 applies the broader interpretation; Van Boom & Luiten 2015, p. 189, seem to argue in line with this interpretation as well.

<sup>150</sup> Section 28 Code of Conduct.

<sup>151</sup> Section 29 Code of Conduct.

<sup>152</sup> Normally, this duty only exists if the defence statements give rise to such exposure. See also section 6.5.2.

<sup>153</sup> Hof Arnhem-Leeuwarden 25 June 2013, ECLI:NL:GHARL:2013:4438.

<sup>154</sup> See Van Boom & Luiten 2015, Philips 2016 and Luiten 2016.

<sup>155</sup> Van Boom & Luiten 2015, p. 190 ff. See also Luiten 2016, p. 21 ff.

which third-party funding will further develop.<sup>156</sup> In 2013, the Minister of Security and Justice discussed potential regulatory routes, but stated that the developments will first be observed.<sup>157</sup> Recently, third-party funding has been discussed in the legislative proposal for a collective action for damages. The proposal includes a provision that a representative organization is required to have sufficient financial means to litigate.<sup>158</sup> This also affects third-party funders, in particular in combination with the already existing provision that a representative organization needs to adequately protect the interests of the aggrieved party.<sup>159</sup> According to the minister, these provisions give the court the opportunity to gain an insight into the financial means of the organization, including a funding construction with a third-party funder. A court can, for instance, find the representative organization inadmissible if it has concluded a funding construction that negatively affects the interests of the aggrieved parties; for instance, if the funder has full control over the decision to accept a settlement. The defendant(s) can be excluded from gaining an insight into such information.<sup>160</sup> The assessment is said to be marginal, however. It suffices that the organization can state and, if deemed necessary, show that at the time of the assessment it has sufficient financial means to execute the litigation.

#### **6.4.4 Special purpose vehicles**

##### **6.4.4.1 Bundled assignments or mandates**

Individual legal claims for damages may represent a (substantial) financial value and, therefore, its alienability is an important legal instrument – also – for collective redress.

In the Netherlands, the transfer of a claim is considered to be a transfer of property and not, as in most other European jurisdictions, a transfer of the claim owner governed by the law of obligations.<sup>161</sup> A claim is transferred through assignment (*cessie*).<sup>162</sup> The third party acquires the right of action because the right it serves to protect has been transferred; it is not possible to merely transfer a right of action.<sup>163</sup> The assignment requires a deed intended for that purpose, and a notice thereof by the assignor or assignee to the debtor(s). Claims are transferable, unless excluded by law, the nature of the right, or the contractual arrangement between creditor and debtor.<sup>164</sup> Furthermore, a (title for) the transfer

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<sup>156</sup> *Kamerstukken II* 2016/17, 34608, 3, p. 11.

<sup>157</sup> *Kamerstukken II* 2011/12, 33126, 6 (letter of the Minister of Security and Justice on third-party funding) and *Kamerstukken II* 2013/14, 31753, 65 (letter of the State Secretary of Security and Justice on contingency fees and third-party funding).

<sup>158</sup> See the proposed section 3:305a(2)(c) BW. This provision is more or less in line with the European Commission's Recommendation 15(b), which states that the court can stay the proceedings if in the case of the use of financial resources provided by a third party, the latter has insufficient resources in order to meet its financial commitments to the claimant party that initiates the collective redress procedure. See Recommendation 15(b) of Recommendation 2013/396/EU.

<sup>159</sup> See the proposed section 3:305a(1) BW, which replaces the current section 3:305a(2) BW.

<sup>160</sup> *Kamerstukken II* 2016/17, 34608, 3, p. 20, with reference to HR 20 December 2002, *NJ* 2004, 4 (*Lightning Casino/Antillen*).

<sup>161</sup> See Zwolfe 2000, p. 227 ff.

<sup>162</sup> Section 3:94 (1) BW.

<sup>163</sup> Section 3:304 BW.

<sup>164</sup> Section 3:83 BW.

of property is void if it is intended for purposes of security (*fiducia cum creditore*) or does not intend to bring the property into the patrimony of the acquirer (*fiducia cum amico*).<sup>165</sup> A fiduciary transfer for purposes of asset-backed financing is allowed as long as it is not merely intended to provide the acquirer with a strong right to have recourse (such as a right of pledge or mortgage).<sup>166</sup> The question of whether parties indeed intended to bring the claim into the third party's patrimony is a matter of construction. Alternatively, the arrangement can be qualified as a – contractual – mandate (*lastgeving* pursuant to section 7:414 BW). In that case, a third party (for instance, a special purpose vehicle) is authorized to collect the claim owner's debt, whether or not in its own name and on its own account. On numerous occasions, the Dutch Supreme Court has qualified a so-called 'assignment for the purpose of debt collection' (*cessie ter incasso*) as a mandate.<sup>167</sup> A special purpose vehicle will probably prefer an assignment over a mandate, as an assignment gives it full control over the claim. An assignment can be combined with a mandate that obliges the entrepreneurial party to transfer the awarded damages to the account of the original creditor subject to the deduction of costs and/or the agreed upon percentage for the entrepreneurial party.<sup>168</sup>

Special purpose vehicles can bundle assignments as an instrument to obtain collective redress, and have done so in various pending competition law cases. So far, this practice has not met with any resistance from the courts, even though defendants have challenged the vehicles' business model and/or the validity of the assignments. These cases will be further discussed in section 6.5.3.

#### 6.4.4.2 Representative organizations

Important within the context of Dutch collective redress are private representative organizations that aim to protect the interests of aggrieved parties. As introduced in section 6.2, these organizations (foundations or associations) can initiate and act as a claimant in a collective action or WCAM settlement. In the past decade, they have increasingly done so on an entrepreneurial basis. In the following, I will sketch the development of these types of special purpose vehicle and introduce their mechanisms to fund collective redress.<sup>169</sup> In recent years, some entrepreneurial representative organizations have been accused of undue behaviour, more specifically of looking after their own interests rather than those of the aggrieved parties. As these incidents take place and shape within the context of (the legal framework of) collective actions and/or WCAM, they will be discussed in section 6.5.

Originally, representative organizations were ideological and/or non-profit organizations. Annual membership fees and donations were their main source of income. Additionally, in the 1980s and 1990s, certain consumer organizations could apply for government subsidies to enable their activities,

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<sup>165</sup> Section 3:84(3) BW.

<sup>166</sup> HR 19 May 1995, *NJ* 1996, 119 (*Sogelease*).

<sup>167</sup> See, for instance, HR 21 October 1983, *NJ* 1984, 254 (*Zomerdijk/Goudsbloem*) and HR 26 November 2004, ECLI:NL:HR:2004:AP9665 (*Haantjes/Damstra*).

<sup>168</sup> See Voute 1993, p. 50.

<sup>169</sup> Parts of this section are taken from Tillema 2017 (section 4.2).

as these were in the public interest.<sup>170</sup> Over the years, however, the subsidies evaporated and the number of memberships slowly declined. At the same time, the Dutch legislative framework for collective redress seemed to open a gateway to entrepreneurial representative organizations. As of the 2000s, they have been increasingly active in the Dutch collective redress landscape. When statements such as ‘the proliferation of claim foundations, compensation culture and entrepreneurial lawyering’ are used, they usually refer to these more or less ad hoc organizations with an entrepreneurial interest that are established after a particular mass damage event to assemble a ‘voice’, increase leverage, and obtain some form of compensation for the represented individuals.<sup>171</sup>

Four types of representative organizations can be distinguished, based on the type of interest they aim to protect. The first type is the representative organizations that pursue a public interest, such as the enforcement of environmental law, human rights or social security; for instance, Stichting Proefprocessenfonds Clara Wichmann (human rights, in particular women’s rights) and Milieudefensie (environmental protection). The second group comprises representative organizations that represent a private interest, such as consumers, retail investors, personal injury victims, tenants and employees. The claim will most likely have a pecuniary component and is often based on law that protects ‘weaker’ groups. Well-known Dutch examples are Consumentenbond (a consumers’ organization) and FNV (an employees’ organization). The third category contains representative organizations that represent commercial or business interests, such as entrepreneurs’ organizations (for instance, MKB), institutional investors, or lessors (for example, Fair Huur). Some organizations might fall into the second and/or third category, depending on their specific action; a notable example is the VEB (a shareholders’ organization that represents both retail and institutional investors). These three types of organizations are often relatively large and independent organizations that have established a track record of representing certain interests.<sup>172</sup> They mainly operate by charging membership fees, contributions and/or receiving donations. They may also have built up a war chest over the years in order to fund (future) collective redress cases.<sup>173</sup>

The fourth and final category might cover all of the mentioned types of interests. In addition, regardless of the type of class members or the law that they protect, these organizations have an entrepreneurial interest: they gain a stake in the outcome of the action by concluding contingency fee arrangements. Their members agree to pay a percentage of the awarded compensation if the organization’s action is successful (sometimes in addition to a fixed membership fee). Such success can be achieved through an extrajudicial collective settlement, whether or not preceded by an individual action (a test

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<sup>170</sup> See *Kamerstukken II* 1983/84, 16983, 5, p. 30, *Kamerstukken II* 1983/84, 16983, 7, p. 19 and *Kamerstukken II* 1984/85, 18600 XIII, 17, p. 8. At least two consumer organizations were active and received such a subsidy: *Consumentenbond* and *Konsumenten Kontakt Stisam*; see Molenberg 1995, p. 339 (footnote 622).

<sup>171</sup> See, for instance, *Kamerstukken II* 2011/12, 33 126, 3, 5, Lemstra 2012, ‘Opkomst claimcultuur in Nederland dreigt’ (9 December 2011) *FD*; ‘Nieuwe wet tegen malafide claimclubs’ (8 December 2012) *Trouw*; ‘Waarom wij de Amerikaanse claimcultuur moeten importeren’ (10 June 2014) *De Correspondent*; ‘Valt hier nog wat te claimen?’ (10 October 2015) *NRC.nl*; ‘Wildgroei aan claimstichtingen’ (20 October 2015) *De Financiële Telegraaf*; [jba.nl/nl/160/een-jaar-namh17-amerikaanse-toestanden-in-nederland](http://jba.nl/nl/160/een-jaar-namh17-amerikaanse-toestanden-in-nederland).

<sup>172</sup> Cornegoor 2009, p. 26 ff.

<sup>173</sup> See also section 6.5.5.

case) or collective action, and/or followed by a WCAM procedure to have the settlement declared binding for all class members. These organizations are mostly established for a particular mass damage event, although some have evolved into a more permanent player with branches that concern different types of mass damage events.<sup>174</sup> At times, they cooperate with or are established by a law firm, a third-party funder, or another representative organization.<sup>175</sup> As discussed, attorneys are generally not allowed to engage in contingency fee arrangements, but this restriction does not apply to representative organizations. As mentioned in section 6.2, foundations and associations are allowed to be driven by profit as long as it is not paid out to the founders or (board) members. Otherwise, they are free to choose their business model and funding arrangement; they are not bound by professional rules and rules of conduct.

## **6.5 Relevant rules and features of the collective redress mechanisms**

### **6.5.1 Briefly brushing up**

As discussed in section 2.2.4, two legal proceedings have been specifically designed for collective redress: the collective action and WCAM.<sup>176</sup> In addition to the current collective action, in 2016, a legislative proposal was submitted to introduce a collective action for damages. In sections 6.5.4 to 6.5.6, I will discuss the particulars of these instruments. First, I will discuss a number of alternative roads that can result in collective redress: joinder, consolidation and a test case (section 6.5.2) and bundled assignments or mandates (section 6.5.3). Due to their limited relevance for entrepreneurial mass litigation, I will only briefly introduce joinder, consolidation and a test case. In section 2.2.4, I also introduced the collective action for the assessment of general conditions. This instrument will not be further discussed as it is seldom used and is not of interest to entrepreneurial parties.

### **6.5.2 Joinder, consolidation and a test case**

First, parties may jointly bring their individual, similar claims in one lawsuit (joinder, *subjectieve cumulatie*). The court can also consolidate proceedings (*voeging*), at its own initiative or at a party's request.<sup>177</sup> The claims remain individual ones and the court might deal with them differently as the law and facts indicate. If efficient adjudication is not served with a joinder or consolidation, for instance, if the individual claims result in different defence strategies, the court might split the action into separate ones, or decide not to consolidate the cases.<sup>178</sup>

Collective redress can also follow a test case, in which a claim similar to many others is brought by one of the aggrieved parties. The test case judgment can set a precedent and might lead the way for others to reach a settlement with the liable party or to bring their own claim. For instance, in three test cases

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<sup>174</sup> See, for instance, *Consumentenclaim* (<consumentenclaim.nl>) and *SMCO* (<collectiefonrecht.nl>).

<sup>175</sup> For instance, *Stichting WAG* (<stwag.gr>) was established by a law firm (*De Haan Advocaten*), and *Stichting Woekerrente* (<woekerrente.nl>) is supported by two more traditional representative organizations (*Consumentenbond* and *Vereniging Eigen Huis*) and backed by a litigation funder (*Claims Funding International*).

<sup>176</sup> Section 3:305a BW and, for the WCAM, section 7:907-910 BW and 1013-1018 Rv. Parts of sections 6.5.4 and 6.5.6 are taken from Tillema 2017 (section 2).

<sup>177</sup> Section 222 Rv. For a more elaborate discussion on these routes, see Frenk 2003, p. 1418-1423.

<sup>178</sup> See Rb. Utrecht 17 December 2008, ECLI:NL:RBUTR:2008:BG7280 (*Beursklacht/Defam*).

concerning the misselling of share leasing contracts, the Supreme Court provided general guidance on how to adjudicate similar cases.<sup>179</sup> Relevant in this respect are the statutory provisions that entered into force in July 2012, under which a district or appellate court – on its own initiative or at the request of one of the parties – may refer a preliminary question to the Dutch Supreme Court should its answer be necessary to come to a decision, and is of direct importance to either a mass damage claim or to the resolution of ‘numerous’ other, ‘factually similar’ civil disputes.<sup>180</sup> This answer can then contribute to negotiating a consensual settlement.

### 6.5.3 Assignment (or mandate) model

A different type of joinder (*objectieve cumulatie*) is created if, as introduced in sections 6.3.6 and 6.4.4.1, a multiplicity of aggrieved individuals assign their claim to an entrepreneurial party or give it a mandate to collect their debts, including the authority to bring an action. The assignee or agent then enforces the aggregated claims in its own name and on its own account. In the case of bundled mandates, the agent might also act in the name of the claim owners.<sup>181</sup> The bundling of these claims does not necessarily constitute a collective redress mechanism. Each claim still needs an examination of the individual circumstances regarding, for instance, the (amount of) damages. If the special purpose vehicle does not sufficiently underpin all independent claims, it risks all of the bundled claims being dismissed.<sup>182</sup>

The question of whether the construction should be qualified as bundled assignments or mandates can give rise to debate and, as mentioned in section 6.4.4.1, is a matter of construction. The qualification, however, may be irrelevant for the vehicle’s standing; a court that finds the assignments invalid might anticipate a valid assignment when the intended assignee has already commenced with pursuing the claim, and in the meantime it will assume that a mandate has been concluded.<sup>183</sup> This is risky, though, and the courts may not be as willing in collective redress cases. In 2009, the Supreme Court found assignments by approximately 10,000 aggrieved parties to be invalid, because the notice of the claim transfer to the debtor did not state the names of the original creditors. Therefore, the claims could not be individualized – rendering them untenable.<sup>184</sup> The special purpose vehicle had based its standing on mandates as well. In the case of a mandate, generally, the name of the creditor does not have to be mentioned in the writ. However, since the defendant had contested the claimant’s capacity to litigate, the court ruled that the vehicle should have proven its capacity to act in its own name. Since it had not done so, the claimant was found to be inadmissible. In spite of this decision, some argue that if a third party can prove standing without revealing the identity of the creditors, it should not

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<sup>179</sup> HR 5 juni 2009, ECLI:NL:HR:2009:BH2811 (*Levob/X*), ECLI:NL:HR:2009:BH2815 (*X/Dexia*), and ECLI:NL:HR:2009:BH2822 (*GeSp/Aegon*).

<sup>180</sup> Section 392-394 Rv. See, notably, Giesen e.a. 2016. The provision does not apply to the Amsterdam Court of Appeal when dealing with a WCAM application; see, critically, Schonewille 2009, p. 79-80.

<sup>181</sup> Section 7:414 BW.

<sup>182</sup> Hof Amsterdam 16 september 2008, ECLI:NL:GHAMS:2008:BF0810 (*Spirit/Aegon*).

<sup>183</sup> See Asser/Bartels & Van Mierlo 2013, no. 359, Asser/Tjong Tjin Tai 2018, no. 280, and Biemans 2011, p. 37. See also HR 2 december 1994, ECLI:NL:HR:1994:ZC1562, *NJ* 1996, 246, m.nt. D.W.F. Verkade (*ABN Amro/Coopag Finance*) and HR 20 september 1991, ECLI:NL:HR:1991:ZC0338, *NJ* 1992, 552, m.nt. J.B.M. Vranken (*Tripels/Mason*).

<sup>184</sup> Hoge Raad 27 november 2009, ECLI:NL:HR:2009:BH2162 (*VEB/WOL*).



have to reveal their names.<sup>185</sup> While this might be correct in theory, it does not sound very viable in practice.

According to Lemstra and Tzankova, a special purpose vehicle will prefer collective action over bundling claims.<sup>186</sup> The latter construction creates complex (administrative) logistics – with all the costs involved – and may give rise to an elaborate defence, possibly in three instances.<sup>187</sup> However, if the number of aggrieved parties is limited, it may be an attractive route to claim damages collectively, particularly since it is not yet possible to claim damages in a collective action. Indeed, special purpose vehicles have done so in various pending competition law cases.<sup>188</sup> So far, this practice has not met with resistance from the courts, even though defendants have challenged the vehicles' business model and/or the validity of the assignments.<sup>189</sup> In 2014, the Amsterdam Court of Appeal – in a request to stay the proceedings – ruled that the mere fact that the litigation vehicle has an entrepreneurial motive did not constitute an abuse of a (procedural) right (section 3:13 BW), nor any other unduly or inadmissible act or behaviour.<sup>190</sup> In two separate cartel cases brought before the Amsterdam District Court, the court ruled that – although German law was applicable – the assignments were not void due to an infringement of public policy (section 3:40 BW).<sup>191</sup> It might have been relevant here that the special purpose vehicle had provided security for litigation costs to address a potential costs award, and that the cost risk (the potential costs order) is much lower in the Netherlands than it is in Germany.<sup>192</sup> Finally, in 2013, following the defendant's motion for the disclosure of documents (*exhibitie*), the District Court of The Hague ruled that the defendant had a sufficient interest in the disclosure of the assignments in order to assess its validity and the applicable law, but not to receive the full documents in order to assess (and potentially contest) the purchase price of the claims.<sup>193</sup>

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<sup>185</sup> Biemans 2011, p. 132.

<sup>186</sup> Tzankova & Van Doorn 2009, p. 106; Lemstra 2009, p. 51.

<sup>187</sup> See, for instance, Rb. Noord-Nederland 23 December 2015, ECLI:NL:RBNNE:2015:5982, Hof Amsterdam 30 June 2015, ECLI:NL:GHAMS:2015:2700, Hof Arnhem-Leeuwarden 29 December 2015, ECLI:NL:GHARL:2015:9921 and Hof Arnhem-Leeuwarden 29 December 2015, ECLI:NL:GHARL:2015:9922.

<sup>188</sup> See, for instance, Hof Amsterdam 24 September 2013, ECLI:NL:GHAMS:2013:3013 and Rb. Amsterdam 25 March 2015, ECLI:NL:RBAMS:2015:1778 (*Equilib/KLM e.a.*), Hof Amsterdam 7 January 2014, ECLI:NL:GHAMS:2014:27 (*East West Debt/KLM e.a.*), Rb. Amsterdam 25 March 2015, ECLI:NL:RBAMS:2015:1780 (*Stichting Cartel Compensation/KLM e.a.*), Rb. Den Haag 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (*CDC/Shell*), Rb. Rotterdam 17 July 2013, ECLI:NL:RBROT:2013:5504 (*Stichting Elevator Cartel Claim/Kone e.a.*), Rb. Amsterdam 4 June 2014, ECLI:NL:RBAMS:2014:3190 (*CDC/Akzo Nobel e.a.*), Rb. Midden-Nederland 27 November 2013, ECLI:NL:RBMNE:2013:5978 (*East West Debt/UTC e.a.*), and Rb. Amsterdam 10 May 2017, ECLI:NL:RBAMS:2017:3166 (*CDC/Kemira*).

<sup>189</sup> See Rb. Amsterdam 7 March 2012, ECLI:NL:RBAMS:2012:BV8444 and Hof Amsterdam 24 September 2013, ECLI:NL:GHAMS:2013:3013 (*Equilib/KLM e.a.*), Rb. Den Haag 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (*CDC/Shell*), Rb. Den Haag 17 December 2014, ECLI:NL:RBDHA:2014:15722 (*CDC/Shell e.a.*), and Rb. Amsterdam 10 May 2017, ECLI:NL:RBAMS:2017:3166 (*CDC/Kemira*).

<sup>190</sup> Hof Amsterdam 7 January 2014, ECLI:NL:GHAMS:2014:27 (*East West Debt/KLM e.a.*).

<sup>191</sup> Rb. Den Haag 17 December 2014, ECLI:NL:RBDHA:2014:15722 (*CDC/Shell e.a.*), and Rb. Amsterdam 10 May 2017, ECLI:NL:RBAMS:2017:3166 (*CDC/Kemira*). See also the German cement cartel case, discussed in section 4.5.5.4.

<sup>192</sup> See sections 6.3.4 and 4.3.4.

<sup>193</sup> Rb. Den Haag 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (*CDC/Shell*).

## 6.5.4 Collective action

### 6.5.4.1 The legal framework

A precondition to litigate in a civil case is a party's capacity to sue. Section 3:296 BW lays down the foundation for a party to bring a claim to court: the person to whom a debtor owes performance has a right of action vis-à-vis the debtor. Nevertheless, as seen in the previous section, the person entitled to bring a claim is not necessarily the (original) creditor. Another addition to the general rule is the collective action under section 3:305a BW: a foundation or association that meets particular criteria is allowed to bring such action against the alleged debtor(s). The representative organization does so in its own name and on its own account, but for the benefit or protection of the similar interests of other persons, diffuse public interests or those of specifically identified class members. Whether the interests are similar depends on the particular circumstances of the case, but the Dutch Supreme Court approaches this issue in a rather generous manner.<sup>194</sup> The collective action should, however, be subsidiary to individual litigation. If it does not offer an advantage over individual litigation, the latter should be followed; according to the legislator, in principle the opposing party has the right to be held accountable by the actual aggrieved party.<sup>195</sup> Moreover, the collective action does not deprive the aggrieved parties of their individual right to litigate.<sup>196</sup> The collective action judgment has limited binding effect (*res judicata*): it only binds the representative organization and defendant. Nevertheless, a court takes a collective action judgment as its point of departure.<sup>197</sup> It then depends on the individual circumstances to what extent the judgment can be challenged.<sup>198</sup> The judgment can also provide a basis for settlement negotiations – possibly followed by a WCAM settlement – or for individual proceedings to seek compensation.<sup>199</sup>

The foundation or association that brings the collective action needs to have full legal capacity and its articles of association should state which interests it aims to protect. The aim should be demonstrated in practice as well (the organization's activities must show that 'the flag covers the cargo').<sup>200</sup> Before bringing a claim, the organization must have made sufficient attempts to reach a settlement through consultation with the party held liable.<sup>201</sup> If it has not done so, in general, the organization will be found inadmissible. This consultation requirement does not constitute a very high threshold to obtain standing: a two-week period after the defendant has received a request for such consultations is sufficient.

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<sup>194</sup> See, for instance, HR 23 December 2005, ECLI:NL:HR:2005:AU3713 (*Safe Haven*); HR 5 June 2009, ECLI:NL:HR:2009:BH2811 (*Levob/Bolle*), ECLI:NL:HR:2009:BH2815 (*De Treek/Dexia*) and ECLI:NL:HR:2009:BH2822 (*Stichting Gedupeerden Spaarconstructie/Aegon*); HR 27 November 2009, ECLI:NL:HR:2009:BH2162 (*VEB/WOL*); and HR 26 February 2010, ECLI:NL:HR:2010:BK5756 (*Plazacasa*).

<sup>195</sup> *Kamerstukken II* 1991/92, 22486, 3, p. 7, 22-23 and 28; and *Kamerstukken I* 1993/94, 22486, 103b, p. 3.

<sup>196</sup> *Kamerstukken II* 1991/92, 22486, 3, p. 26-27.

<sup>197</sup> HR 27 November 2009, ECLI:NL:HR:2009:BH2162 (*VEB/WOL*), consideration 4.8.2.

<sup>198</sup> See *Kamerstukken II*, 1991/92, 22486, 3, p. 26.

<sup>199</sup> *Kamerstukken II* 2003/04, 29414, 7, p. 6 and 9; *Kamerstukken I* 2004/05, 29414, C, p. 2-3.

<sup>200</sup> *Kamerstukken II* 1991/92, 22486, 3, p. 20.

<sup>201</sup> Section 3:305a(2) BW.

An increase in the establishment of (ad hoc) representative organizations after mass damage events, combined with media criticism about the performance of certain organizations, led a group of practitioners to establish the Claimcode, a self-regulatory initiative on the corporate governance of representative organizations, which entered into effect in July 2011.<sup>202</sup> Moreover, in 2013, an addition was made to the admissibility test of section 3:305a(2) BW. This addition specifies that a representative organization will also be found inadmissible if its claim does not sufficiently guarantee the interests of the class members.<sup>203</sup> The aim of the provision is not to discourage representative organizations from entering the market in general, because they play a valuable role in the settlement of mass damage cases, but to discourage organizations that have a solely entrepreneurial objective.<sup>204</sup> This is related to the legislator's concern that such organizations may be driven first and foremost by their own interests instead of those of the aggrieved parties. Furthermore – much like the Claimcode – the amendment aims to improve the transparency and accountability of representative organizations. The amendment focuses on three perspectives: that of the aggrieved parties, defendants, and the judiciary. First, aggrieved parties most likely lack the necessary knowledge to assess the motives and expertise of representative organizations. The provision should create more insight into this. Second, the alleged liable party might have difficulty in judging what organization is sufficiently professional to negotiate with in order to reach a just solution. Third, the advantage of the efficient administration of justice partly perishes if multiple organizations bring collective actions for the same collective dispute. This phenomenon is cost-ineffective, needlessly strains the courts, and can lead to conflicting outcomes.<sup>205</sup>

The stricter rule stipulates that a representative organization is inadmissible if its claim does not sufficiently protect the interests of the aggrieved parties. This can only really be assessed in a specific case, but according to the minister this should entail a twofold test: first, to what extent the represented persons will benefit from the collective action if the claim is upheld and, second, to what extent can the representative association be trusted to have adequate knowledge and skills to litigate.<sup>206</sup> A number of factors are mentioned that could play a role in this test: the (successfulness of the) activities undertaken by the organization for the aggrieved parties in the mass damage event at hand or a previous one; the number of aggrieved parties participating in the organization and the extent to which they support the collective action; the extent to which the organization meets the principles laid down in the Claimcode; whether the organization has acted as an interlocutor with, for instance, the government; and its media exposure. As for the remuneration structure of representative organizations, however, the minister has explicitly stated that the court's assessment of a representative organization should not involve a test on the organization's business model, such as what contingency fee percentage is reasonable.<sup>207</sup> The legislative proposal to allow representative organizations to claim for damages might (re)boost this debate, also in light of the European Commission's Recommendation 32,

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<sup>202</sup> The *Claimcode* is available at <[stichtingservice.nl/wp-content/uploads/2014/07/claimcode-voor-claimstichtingen.pdf](http://stichtingservice.nl/wp-content/uploads/2014/07/claimcode-voor-claimstichtingen.pdf)>. See also the Explanatory Document by Lemstra & Okhuijsen 2010.

<sup>203</sup> See *Kamerstukken II* 2011/12, 33 126, 3, 4-5, and *Kamerstukken II* 2012/13, 33 126, 7, 10 ff.

<sup>204</sup> *Kamerstukken II* 2011/12, 33 126, 3, p. 4-5.

<sup>205</sup> *Kamerstukken II* 2011/12, 33 126, 3, p. 13.

<sup>206</sup> *Kamerstukken II* 2011/12, 33 126, 3, p. 12 ff, and *Kamerstukken II* 2012/13, 33 126, 7, p. 10 ff.

<sup>207</sup> *Kamerstukken II* 2011/12, 33 126, 3 and 6, and *Kamerstukken II* 2012/13, 33 126, 7, 10 ff. and 19 ff.

which states that for cases of private third-party funding of compensatory collective redress, it is prohibited to base remuneration on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority.

So far, representative organizations have relatively easily obtained standing before the courts.<sup>208</sup> The court's willingness might be connected with an important limitation to the collective action regulation: the procedure does not – yet – allow the representative organization to claim for damages (no compensatory collective action). Currently, collective actions are primarily brought to obtain a declaratory judgment that states the legal relationship between the parties,<sup>209</sup> such as the establishment that the defendant has committed a tort against the aggrieved persons. If the interests are suitable for bundling to provide efficient and effective legal protection, the common points of law will be judged separately from the particular individual circumstances that may or may not actually lead to compensation, such as causation or contributory negligence.

#### 6.5.4.2 The practical operation

Since the introduction of section 3:305a BW in 1994, representative organizations frequently bring collective actions.<sup>210</sup> To illustrate this, I have conducted a case law study on collective actions from 1999 to 2015.<sup>211</sup> One of the main findings was the upward trend of collective actions that have been dealt with by the Dutch courts and that the initiators responsible for bringing most cases are those that represent the interests of 'weaker' parties, such as consumers and employees, and cases in which commercial interests were dealt with, such as those of branch organizations. The number of cases brought by entrepreneurial representative organizations starts to gradually climb from 2008 onwards, but remains (well) under the level of the number of cases brought by the other representative organizations. However, the relative size of cases of entrepreneurial organizations has grown. These findings did not necessarily support the claim that the development of entrepreneurial organizations arose from a decrease in (the financial means of) representative organizations such as the Consumentenbond. The findings did support the claim that there is an increased detection of mass wrongdoings,<sup>212</sup> although the number of collective actions appears to have remained modest: in the period 2007-2015, there were 20-26 published judgments per annum. Nevertheless, the increase is not necessarily or merely instigated by entrepreneurial organizations.

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<sup>208</sup> Tzankova & Lunsingh Scheurleer 2009, p. 153, Van der Heijden 2010, and Tillema 2017.

<sup>209</sup> Tzankova & Lunsingh Scheurleer 2009, p. 153.

<sup>210</sup> *Kamerstukken II* 2011/12, 33 126, 3, p. 4.

<sup>211</sup> See Tillema 2017. I conducted searches in the court database (*rechtspraak.nl*), which is in operation since 1999, using the following keywords: '3:305a', '305a', and '*collectieve actie*'. The database was last consulted on 19 January 2016. It is important to note that the consulted database might not list all existing case law on collective actions, although it is said to contain the most important assembled judgments (for the selection criteria, see <[rechtspraak.nl/Uitspraken-en-nieuws/Uitspraken/Paginas/Selectiecriteria.aspx](http://rechtspraak.nl/Uitspraken-en-nieuws/Uitspraken/Paginas/Selectiecriteria.aspx)>). The analysed data might not completely reflect reality, but the sample (n=287) does reveal indicative trends and enables tentative conclusions to be drawn.

<sup>212</sup> Tzankova 2012, p. 559.

To further illustrate the practical operations of entrepreneurial parties, in the following, I outline the DSB case.<sup>213</sup> In April 2009, the Dutch privately owned DSB Bank was discredited after being accused of mis-selling financial products and of breaching its duties of care, which eventually led to the bank's insolvency in October 2009. In the intervening months, a number of representative organizations had emerged, and continued to do so after the insolvency. All of these organizations stated that they aimed to protect the interests of the aggrieved parties, but the manner in which they carried out this practice varied. In the following, I present this variety through subsequently describing the structure, target group, and activities the organizations carried out, and the cooperation and competition between the organizations.

First, some organizations aimed to protect the interests of a general group, in other words, the aggrieved parties of DSB. Others represented certain aggrieved parties, such as the subordinated deposit holders or the mortgage holders. Some organizations emerged within an existing organization that had already acted in other financial products cases, and through that had gained experience. Others were established for this particular event – some by the aggrieved parties themselves, and some in cooperation with (renowned) individual attorneys or law firms. A common denominator for most organizations was to inform (former) clients about the developments regarding the insolvency of DSB. They provided a forum, organized information meetings and Q&A through websites or email, and published newsletters, among other related activities. With that, some organizations primarily rendered a support group for aggrieved parties, giving them a way to ventilate their grievances and to give or obtain advice, such as on suitable attorneys. For other organizations, providing information was only one of the many services they provided. Some gave legal advice, such as on how to submit a claim to DSB administrators. Some offered to deliberate with politicians or to negotiate with the administrators of DSB. Some offered to draft individual damage reports and/or to focus their activities on individual or collective litigation. Some primarily stated that they would litigate.<sup>214</sup> Some organizations based the

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<sup>213</sup> The websites of the following organizations were visited: Stichting Hypotheekleed (DSB-Leed), Stichting Steunfonds Probleemhypotheek, Stichting Platform Aandelen Lease, Vereniging DSBdepositos, Stichting Centralebankclaim, Stichting SOBI, DSB-Klantenleed, DSB Ramp, Vereniging Cliënten Financiële Instellingen, Stichting consumentenclaim, Vereniging Payback, DSB Schadeclaim, Stichting Meldpunt Collectief Onrecht, Stichting Spaarders DSB, DSBSpaarder, Stichting Belangen Gedupeerde Spaarders. Furthermore, the public insolvency reports by the administrators of the DSB Bank were consulted, available – in English – at <http://www.dsbbank.nl/crediteuren/en/public-reports/dsb-bank-%28public-reports%29/>; as well as some newspaper articles and consumer programmes' webpages, such as <[kassa.vara.nl/tv/afspeelpagina/fragment/welke-stichting-moet-u-kiezen/speel/1/](http://kassa.vara.nl/tv/afspeelpagina/fragment/welke-stichting-moet-u-kiezen/speel/1/)>, <[volkskrant.nl/vk/nl/2680/Economie/archief/article/detail/974431/2010/01/02/Stilte-voor-de-storm-rond-belangenclubs-DSB.dhtml](http://volkskrant.nl/vk/nl/2680/Economie/archief/article/detail/974431/2010/01/02/Stilte-voor-de-storm-rond-belangenclubs-DSB.dhtml)>, <[volkskrant.nl/vk/nl/2844/Archief/archief/article/detail/2949486/2011/10/05/De-DSB-regeling-farce-of-zegen.dhtml](http://volkskrant.nl/vk/nl/2844/Archief/archief/article/detail/2949486/2011/10/05/De-DSB-regeling-farce-of-zegen.dhtml)>, <[novatv.nl/page/detail/nieuws/17320/Jelle+Hendrickx+weg+bij+DSB-stichting](http://novatv.nl/page/detail/nieuws/17320/Jelle+Hendrickx+weg+bij+DSB-stichting)>, <[trosradar.nl/nieuws/archief/detail/article/betaal-dsb-schuld-niet/](http://trosradar.nl/nieuws/archief/detail/article/betaal-dsb-schuld-niet/)>.

<sup>214</sup> For instance, an association reported through various media that it would bring 50 test cases against the (administrators of) DSB. The association sent emails to thousands of the bank's clients, advising them to stop paying their mortgage interest in the meantime. In 2010, they also filed a request to discharge the administrators of the DSB. This request was denied, primarily because the association ceased to exist before the action was brought (Rb. Amsterdam 3 December 2010, ECLI:NL:RBAMS:2010:BO6143). To my knowledge, apart from this request, no other cases were brought to court, possibly indicating that the test cases were never actually brought.

decision to litigate on the number of aggrieved parties participating in their organization; they needed a critical mass to fund the action(s).

The activities of the representative organizations were usually accompanied by appearances in various media, such as the broadcasts of popular consumer programmes. Some of the ad hoc organizations used powerful language to push their services, such as ‘You complain, we’ll file a complaint!’ and ‘Independent & neutral; the only independent website for DSB customers’. They all wanted to be considered the tortfeasor’s most important negotiation partner; hence, the amount of aggrieved parties signing up was important.<sup>215</sup> In the competition for aggrieved parties’ attention, fierce debate took place among the organizations. On the other hand, some organizations successfully joined forces. In September 2011, the administrators of DSB, two representative organizations, and five legal expenses insurance companies reached a settlement to compensate former and current customers in cases that concerned insurance policies, securities-backed lending products, and compensation for excessive lending. Furthermore, a foundation that protected the interests of subordinated deposit holders reached a settlement with the administrators after filing a test case that was successful at the court of first instance.

Despite these settlements, competition between the various organizations did not end. For instance, one organization set out to help individuals obtain more advantageous individual results by rejecting and challenging the 2011 settlement. This ‘after the settlement’ competition was already identified in the Dexia case on the misselling of share leasing products, when the success of two representative organizations in the realization of the Dexia settlement gave rise to the establishment of other organizations.<sup>216</sup> The latter organizations successfully persuaded a large group of aggrieved parties to refuse to consent to the Dexia settlement that was declared binding through a WCAM procedure (thus, to opt out), claiming that they could receive better compensation through individual litigation than through the settlement. Despite the legislator’s and the defendant’s intentions to avoid further litigation, other organizations’ activities prevented (full) finality.

It was the DSB case in particular that incited the legislative amendment to require a representative organization to sufficiently guarantee the interests of the class members.<sup>217</sup> Furthermore, on various occasions, the minister has attributed an important role to the aforementioned Claimcode. However, the truth is that the code does not have a statutory basis and lacks an official status for enforcement purposes. In spite of a Monitoring Committee that was established to ensure correct compliance with the Claimcode, research has shown that the Claimcode has not led to a desirable level of representation; for instance, few claim vehicles have established a supervisory board or are subject to accountants’ audits.<sup>218</sup> A notorious illustration is provided by the Stichting Loterijverlies case. In 2008, this foundation initiated a collective action on behalf of aggrieved lottery ticket holders against the Dutch State Lottery (*Staatsloterij*). At the time of the final judgment (see hereafter) the foundation had about

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<sup>215</sup> Lemstra 2009, p. 39 and 43.

<sup>216</sup> Huls & Van Doorn 2007, p. 56, and Tzankova 2012, p. 577 ff.

<sup>217</sup> See section 6.5.4.1.

<sup>218</sup> See Barneveld 2012, § 8, and Bauw & Bruinen 2013 and Bauw & Van der Linden 2016.

22,000 members. Each had paid a registration fee of approximately € 40 and had concluded a contingency fee agreement to pay, in the case of success, 15% of damages obtained to the limited company that was linked to the foundation. The Court of Appeal of The Hague accepted this construction by ruling that there was no abuse of the right to bring a collective action if the commercial interests of the companies behind the foundation (or its founder) played a role in the action.<sup>219</sup> After years of litigation, in 2015, the Supreme Court ruled that the Dutch State Lottery, for years, had misled consumers as to the chances of success and the number and amount of prizes that could be won through the lottery.<sup>220</sup> The judgment, as it was a collective action, did not address the damage suffered, but various authors have emphasized the complexity of establishing causation and damages in this case.<sup>221</sup> Nevertheless, according to the spokesman of the foundation, the compensation could run up to € 13 million. Predictably, the negotiations between the foundation and the State Lottery failed to progress smoothly. At the same time, various media started to raise concerns about the financial activities of the founder and sole board member of the foundation. Eventually, in 2016, a number of members of the foundation successfully filed a request to replace the foundation's board, a judgment which was upheld on appeal.<sup>222</sup> According to the board member under scrutiny, this case was initiated and funded by a competing litigation funder with ties to the now appointed interim board member.<sup>223</sup> Meanwhile, another representative organization was established. In 2017, this organization entered into an amicable settlement with the State Lottery. The settlement granted all aggrieved parties two to four lottery tickets in an extraordinary, one-off draw. Apart from waiving the right to further pursue damages, class members are free to participate. Moreover, those that have participated in *Stichting Loterijverlies* will be reimbursed their registration fee of € 40. Reportedly, 2.5 million individuals participated in the settlement/draw.<sup>224</sup>

Two other recent cases show the increasing scrutiny of the courts as to the entrepreneurial motives of the representative action.<sup>225</sup> In both cases, the court ruled that the organization in question did not sufficiently represent the interests of the aggrieved parties. Furthermore, a currently pending legislative proposal aims to improve the corporate governance of, inter alia, foundations and associations in general.<sup>226</sup> Combined with potentially stricter rules for representative organizations, as suggested in the legislative proposal for collective actions for damages (see hereafter), this might increase the quality and governance of representative organizations and reduce the risks as described above.

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<sup>219</sup> Hof Den Haag 28 May 2013, ECLI:NL:GHDHA:2013:CA0587, consideration 2.4.

<sup>220</sup> HR 30 January 2015, ECLI:NL:HR:2015:178, *NJ* 2015/377, m.nt. Lindenbergh, and AA 20150784, annotated by Van Boom & Pavillon.

<sup>221</sup> See, for instance, the annotations mentioned in the previous footnote.

<sup>222</sup> Hof Amsterdam 31 January 2017, ECLI:NL:GHAMS:2017:210.

<sup>223</sup> <nrc.nl/nieuws/2016/10/14/miljoenenspel-4828527-a1526721>.

<sup>224</sup> <ad.nl/binnenland/al-2-5-miljoen-deelnemers-aan-extra-trekking-staatsloterij~ac73b3f8/>.

<sup>225</sup> Rb. Amsterdam 30 November 2016, ECLI:NL:RBAMS:2016:7841 (*Trafigura*) and Rb. Oost-Brabant 29 June 2016, ECLI:NL:RBOBR:2016:3383 (*Stichting Renteswapschadeclaim*).

<sup>226</sup> *Kamerstukken II* 2015/16, 34491.

### 6.5.5 Collective action for damages

Both the need for and negative consequences of a collective action for damages have been debated for years. Although questioned by some, others deemed that such action is necessary for the situation in which an alleged liable party is not willing to negotiate after a successful collective action for declaratory relief. The proponents deemed that introducing a collective action for damages is preferable to expecting class members to bring individual actions. In November 2011, a parliamentary motion to draft such legislation was adopted.<sup>227</sup> In 2014, a draft bill was published. It contained a complex five-step procedure, and drew sharp criticism for various reasons.<sup>228</sup> After a significant revision of the draft, the minister submitted the legislative proposal for a collective action for damages in November 2016.<sup>229</sup> As mentioned in section 2.2.4, one of its main features is to stimulate collective settlements by improving both the quality of representative parties, the coordination of collective actions, and the finality of a settlement agreement or judgment. Just as the current collective action does, the proposed action for damages applies to all types of civil claims, to avoid undesirable discussions on the applicable legal framework. Consensual settlement remains the preferred route to obtain collective redress.<sup>230</sup>

Collective actions for damages can be brought before the district court that has jurisdiction. Under the original proposal, the Amsterdam District Court had exclusive jurisdiction to deal with any collective actions, including those for injunctive or declaratory relief. After various objections, this exclusivity was abolished.<sup>231</sup>

The proceedings consist of three phases, which can be summarized as follows. If a collective action is brought, the representative organization will have to publish this in a public register. Subsequently, for a period of three months, other representatives are allowed to file their own claim concerning the same event, and to register it.<sup>232</sup>

After the registration phase has ended, the second phase starts, in which the court will assess a) the commonality of the claims, and b) the admissibility of the representative organization(s).<sup>233</sup> The proposal includes judicial powers to further scrutinize the adequacy of representative parties by, once more, raising the threshold for obtaining standing. The new admissibility requirements concern the organization's governance, funding, and representativeness. The court has the authority to assess the

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<sup>227</sup> *Kamerstukken II* 2011/12, 33 000-XIII, 14.

<sup>228</sup> *Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken*, Consultatieversie Juli 2014. An English summary of the consultation document is available at <[internetconsultatie.nl/motiedijksma/berichten](http://internetconsultatie.nl/motiedijksma/berichten)>. For criticism, see, for instance, the responses to the consultation document from the Dutch employers' organizations VNO-NCW and MKB-Nederland, and from the U.S. Chamber Institute for Legal Reform; [internetconsultatie.nl/motiedijksma/reacties](http://internetconsultatie.nl/motiedijksma/reacties).

<sup>229</sup> *Kamerstukken II*, 2016/17, 34608, which followed stakeholder meetings organized by the Ministry and Recommendations issued by a group of lawyers.

<sup>230</sup> *Kamerstukken II*, 2016/17 34608, 3, p. 4.

<sup>231</sup> Section 1018b (3) Rv, as amended by *Kamerstukken II* 2017/18, 34608.

<sup>232</sup> Sections 1018c and 1018d Rv, as proposed.

<sup>233</sup> Section 1018c (1)(c) Rv, as proposed.



organization of its (supervisory) board, its financial means, experience and expertise, its measures to enable class members to monitor or control its decisions, and to request the disclosure of its annual account and report. These requirements can be disregarded if they are deemed to be disproportionate, for instance, for representative organizations with a public interest motive. If more than one representative organization has filed a claim, the court will at this phase also appoint the most suitable one as the exclusive representative (*exclusieve belangenbehartiger*). As to suitability, the court should take into consideration – in addition to the admissibility criteria – the size of the represented class and the amount in dispute, as well as the other and previous activities that the candidate has undertaken for the represented type of class members or collective redress in general.<sup>234</sup> If the nature of the claims, representatives or claimants so dictates, the court can appoint more than one exclusive representative.<sup>235</sup> The decision on the appointment of an exclusive representative is not subject to appeal.<sup>236</sup>

The exclusive representative becomes the main litigant with a coordinating role and, in principle, is the one that conducts the litigation. The non-exclusive representative organization(s) remain(s) as the claimant(s). The court can allow them to give instructions or to be heard. They can also monitor the exclusive representative. The relevance of the other organizations in monitoring the exclusive representative relates to another important element of the proceedings: there is only one opt-out moment for class members, unless the proceedings result in a court-approved collective settlement, in which case a second opt-out moment will follow.<sup>237</sup> The first (and possibly, only) moment to opt out is within a court-ordered period after the second phase ends with the judgment that describes the claim, class and, possibly, the appointment of the exclusive representative.<sup>238</sup> At that time, non-Dutch class members can opt in to the proceedings.<sup>239</sup>

In the third and last phase, the claim is assessed on its merits. This does not necessarily include an assessment of individual damages by the court. As in the WCAM, the bill allows for settling damage by means of damage scheduling, either as part of a judgment or a collective settlement. Hence, individual matters such as quantum, contributory negligence and causation might be taken into account to a certain extent only.<sup>240</sup> Where possible, the court should stimulate parties to come to an amicable settlement. To enable such a settlement, the court can refer a preliminary question to the Supreme Court.<sup>241</sup> The criteria for the approval of a collective settlement are the same as those under the WCAM.<sup>242</sup> If the action nevertheless results in a judgment, it will have binding effect on all class members who have not opted out after the second phase. Such a judgment can include a one-way, full

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<sup>234</sup> Section 1018e (1) Rv, as proposed.

<sup>235</sup> Section 1018e (3) and (4) Rv, as proposed.

<sup>236</sup> Section 1018e (1) Rv, as proposed.

<sup>237</sup> Sections 1018f (1) and (3) and 1018h (5) Rv, both as amended by *Kamerstukken II 2017/18*, 34608, 7.

<sup>238</sup> Section 1018f Rv, as amended by *Kamerstukken II 2017/18*, 34608, 7 and 1018e (1) and (2) Rv.

<sup>239</sup> Section 1018f (5) Rv, as amended by *Kamerstukken II 2017/18*, 34608, 7. Upon request, the court can instead order that an opt-out regime be applied for foreign class members.

<sup>240</sup> Section 1018i Rv.

<sup>241</sup> Pursuant to section 392-394 Rv. See also sections 2.2.4 and 6.5.2.

<sup>242</sup> See section 6.5.6.1.

indemnity costs shifting rule in favour of the exclusive representative organization, in order to meet its financial burden of a successful action. Hence, only the defendant can be ordered to pay the full adverse costs; for a potential costs order in its favour, the regular cost rules apply.<sup>243</sup>

The appointment of an exclusive representative in combination with the early opt-out moment has raised some concerns, also because the decision is not subject to appeal.<sup>244</sup> Class members may not yet have had the opportunity to fully ‘assess’ the representative’s actions on its merits. If during the proceedings, they become uncomfortable with their representative, they can no longer opt out (unless the action results in a settlement). Some fear that the risk of undue behaviour is not sufficiently mitigated by the proposed admissibility and suitability requirements. For instance, the suitability requirements might lead to the appointment of a mediagenic representative that might not necessarily be the best choice.<sup>245</sup> Furthermore, the proposal remains unclear on the extent of the interference by other representatives and the court’s role in this regard.<sup>246</sup> A recommendation to allow some type of interlocutory assessment of the exclusive representative has not been followed up.<sup>247</sup> We will have to wait and see how this will all develop in practice, that is, if the legislative proposal becomes law.

## **6.5.6 WCAM**

### **6.5.6.1 The legal framework**

In addition to the collective action regulation, in 2005, the WCAM regulation entered into effect. The enactment was fuelled by the DES case, in which thousands of persons were harmed because their mothers had used DES (diethylstilbestrol) during their pregnancy. Inspired by the US damages class action, the act opts for a collective settlement as the route for resolving a mass damage dispute. The 2008 evaluation of the WCAM led to the conclusion that it provides for an efficient and effective method to settle mass claims.<sup>248</sup>

In short, the procedure provides for one or more representative organizations, on the one hand, and the alleged liable party, on the other, to submit a joint application to the Amsterdam Court of Appeal requesting it to declare legally binding a consensual settlement that contains rights to compensation for the class members.<sup>249</sup> The settlement may have followed a previous test case or collective action, or may have completely arisen out of court. As part of the WCAM proceedings, the Amsterdam Court of Appeal assesses whether the interests of the class members are sufficiently guaranteed. The main

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<sup>243</sup> See section 6.3.4.

<sup>244</sup> See *Kamerstukken II* 2016/17, 34608, 4, p. 3-6, *Kamerstukken II* 2016/17, 34608, 5, p. 6-7, Arons & Koster 2017, Bauw & Voet 2017, Pavillon & Althoff 2017. The lack of any appeal is contrary to the recommendation by Haazen e.a. 2016 (the *Juristengroep*).

<sup>245</sup> Bauw & Voet 2017, p. 246, Pavillon & Althoff 2017, p. 108.

<sup>246</sup> See also *Kamerstukken II* 2016/17, 34608, 4, p. 3-6.

<sup>247</sup> Haazen e.a. 2016; see also Rutten 2015.

<sup>248</sup> *Kamerstukken II* 2008/09, 31762, 1, p. 4. See also the EC study on collective redress, which showed that the WCAM is viewed in a positive light due to its broad and preventive effect, as well as its speed and low costs; Civic Consulting & Oxford Economic, *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union. Final Report*, Berlin 2008, p. 9, 19 and 87.

<sup>249</sup> The Amsterdam Court of Appeal has exclusive jurisdiction.

questions it addresses is whether the representative organization(s) is (are) sufficiently representative and the amount of compensation is reasonable in light of the extent of the damage, the ease and speed with which class members can obtain compensation and the possible causes of their damage.<sup>250</sup> The settlement can minimize the number of relevant individual circumstances by way of damage scheduling. The agreement should list the factors that the aggrieved party has to meet, how this person will be classified into a particular category and how to obtain the corresponding damages.<sup>251</sup> During the proceedings, individuals and other representative organizations have the right to raise objections against the settlement.<sup>252</sup> If the court declares the settlement to be binding, all individuals affected by the mass damage event are bound by the settlement, unless they opt out within a certain period (of at least three months) following the announcement of the order.<sup>253</sup>

In 2013, the possibility was introduced to hold a pre-trial hearing (*preprocessuele comparitie*) in order to increase parties' willingness to negotiate or discuss the further course of action. A party is now able to request the assistance of a judge at an early stage of the negotiations or if the other party refuses to enter into negotiations.<sup>254</sup> During the hearing, the court has a facilitative and guiding role. It may assist parties in formulating the most important matters in dispute, discuss further case management, such as the desirability of bringing collective action, and/or stimulate parties to enter into a settlement, for instance with the aid of a mediator.<sup>255</sup> A hearing can be requested a) by a representative organization that protects the interests of aggrieved parties, and that pursuant to section 7:907 (1 and 3, f) BW would be entitled to submit an application to have a WCAM settlement declared legally binding; b) by the alleged liable party or parties; or c) by a joint application. The applicant and the summoned parties are obliged to attend the hearing. The judge can order an absent party to pay wasted costs. The district courts have jurisdiction over applications for a pre-trial hearing (parties are therefore required to be represented by an attorney). In response to a question by a Member of Parliament, the minister stated that these cases are not allocated to the Amsterdam Court of Appeal on purpose: a court under whose guidance a collective settlement is concluded should not also be the one to determine whether the settlement is reasonable.<sup>256</sup>

#### 6.5.6.2 The practical operation

Since 2005, the Amsterdam Court of Appeal has declared eight collective settlements to be binding in seven cases: DES, Dexia, Vie d'Or, Shell, Vedior, Converium, and DSB.<sup>257</sup> Table IX presents an outline

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<sup>250</sup> Section 7:907(3)(b) BW.

<sup>251</sup> Section 7:907 (2) (c-e) BW. See also *Kamerstukken II* 2003/04, 29414, 3, p. 11-12.

<sup>252</sup> Section 282 in conjunction with section 1014 Rv.

<sup>253</sup> Section 7:907(2) BW in conjunction with section 1017(3) Rv.

<sup>254</sup> Section 1018a Rv.

<sup>255</sup> *Kamerstukken II* 2008 /09, 31 762, 1, p. 5-6 and *Kamerstukken II* 2011 /12, 33 126, 3, p. 25-27.

<sup>256</sup> *Kamerstukken II* 2011/12, 33 126, 3, p. 26-27.

<sup>257</sup> *DES* (1 June 2006, ECLI:NL:GHAMS:2006:AX6440), *Dexia* (25 January 2007, ECLI:NL:GHAMS:2007:AZ7033), *Vie d'Or* (29 April 2009, ECLI:NL:GHAMS:2009:BI2717), *Shell* (29 May 2009, ECLI:NL:GHAMS:2009:BI5744), *Vedior* (15 July 2009, ECLI:NL:GHAMS:2009:BJ2691), *Converium* (17 January 2012, ECLI:NL:GHAMS:2012:BV1026), and *DSB* (4 November 2014, ECLI:NL:GHAMS:2014:4560).

of the cases and settlements.<sup>258</sup> An eighth case is currently pending, the Fortis settlement. A request to have the settlement declared binding has been filed in May 2016, and an interlocutory decision was issued in June 2017.<sup>259</sup>

As the 'Type of case' table row shows, the WCAM instrument mainly deals with financial products and securities cases. After the first WCAM settlement, in the DES case, no other settlement of personal injury claims followed, even though the WCAM was designed with this type of mass damage cases in mind.<sup>260</sup> The organizations that were involved in the settlements can be qualified as those representing either private or commercial interests. In addition, in both the Shell and Converium settlements, US principal counsel was involved. Based on the manner in which these attorneys or law firms were remunerated (through contingency fee arrangements), they can be qualified as entrepreneurial parties.

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<sup>258</sup> Table taken from Tillema 2017, p. 237-238. Most parts of the following analysis are based on this publication, p. 239-241.

<sup>259</sup> See [rechtspraak.nl/Uitspraken-en-nieuws/Bekende-rechtszaken/WCAM-Verzoekschrift-Ageas-SA-NV/Paginas/default.aspx](http://rechtspraak.nl/Uitspraken-en-nieuws/Bekende-rechtszaken/WCAM-Verzoekschrift-Ageas-SA-NV/Paginas/default.aspx).

<sup>260</sup> *Kamerstukken II* 2003/04, 29 414, 3, 2. See also Tzankova & Lunsingh Scheurleer 2009.

	<b>DES</b>	<b>Dexia</b>	<b>Vie d'Or</b>	<b>Shell</b>	<b>Vedior</b>	<b>Converium</b>	<b>DSB</b>
<b>Year of WCAM decision</b>	2006 and 2014	2007	2009	2009	2009	2012	2014
<b>Type of case</b>	Product liability	Financial products and services	Financial products and services	Securities	Securities	Securities	Financial products and services
<b>Class members</b>	Personal injury victims	Retail investors (share leasing product)	Life insurance policy holders	Non-US shareholders	Shareholders worldwide	Non-US shareholders	Purchasers of various products
<b>Size of the class (approximately)</b>	Not quite clear. 17,000 persons registered in 2005	300,000, of whom 25,000 persons (8.3%) opted out	11,000	500,000	2000	12,000	345,000, of whom 300 persons (0.1%) opted out
<b>Representative organization (RO)</b>	Stichting DES Centrum	Stichting Leaseverlies, Stichting Eegaalse, VEB, and Consumentenbond	Stichting Vie d' Or	Shell Reserves Compensation Foundation, VEB, and two pension funds	VEB and Stichting uitvoering Vedior schikking (claim administrator)	Converium Securities Compensation Foundation and VEB	Stichting SSP, Stichting PAL, and Stichting SBRd (LEI)
<b>(Alleged) liable party or parties</b>	Pharmaceutical companies and insurers	Dexia (and Aegon)	Supervisor, state, auditors and actuary	Shell	Human resources agency	Converium (reinsurer)	DSB's trustees plus insurers
<b>Funding of ROs activities prior to settlement</b>	Subsidies and donations	Participants of ROs (or their LEI) paid a contribution of €45.	Supervisor established and funded RO	Shell established and funded Foundation	Members of VEB pay annual membership fee plus war chest of VEB	US attorneys and (alleged) liable parties established & funded Foundation	Own resources, and defendants paid fees during negotiations
<b>Settlement amount</b>	€38 million	€1 billion	€45 million	\$448 million	€4 million	\$58 million (incl. compensation ROs)	max €500 million
<b>RO compensated in settlement</b>	Unknown	Dexia bears litigation and administration costs of ROs	Supervisor bears RO's costs ('voluntarily') to a maximum of €8.5 million	Shell bears costs of Foundation (\$6 m), VEB (\$6.2 m + attorney's fees) and US principal counsel (\$47 m).	Randstad bears costs of Stichting to a maximum of €212,000, plus the settlement costs	Converium bears costs of Dutch litigation and administration (€1.6 million) plus US principal counsel fee (20% of settlement)	DSB bears the RO's costs, including annual amount to SSP and remuneration board SBRd
<b>Compensation RO assessed?</b>	No	No	No	Limited	Limited	Yes	No

Table IX Overview of the WCAM cases (2005-2017)

With seven WCAM settlements concluded in over a decade, it is difficult to continue to insist that the instrument has given rise to an increase in litigation,<sup>1</sup> let alone an increase instigated by entrepreneurial organizations. Instead, it probably has the opposite effect, as it might – as intended – lead to a decline in ‘regular’ civil litigation. This assumes a certain interchangeability: that in each WCAM case, there would have been an outpouring of individual claims before the Dutch courts had the WCAM not existed. This cannot be easily tested, at least not with the study at hand. However, there is one case that hovered around both before and after the introduction of the WCAM, and although this is only one example, it does provide some evidence that the assumption is tenable. In the Dexia case (on the misselling of share leasing products), hundreds of individual cases flooded the courts of first instance, long before the WCAM instrument was implemented and a WCAM settlement was reached.<sup>2</sup> After the settlement was declared binding, the cases in court kept coming due to the many opt-outs. This lack of finality was probably caused by the following two factors. First, during the opt-out period, some courts issued more favourable judgments compared to the individual compensation that would be obtained through participating in the WCAM settlement. Second, this judicial buoyancy played directly into the hands of representative organizations that had already started to compete with the representative organizations that had realized the Dexia settlement.<sup>3</sup> The competitors claimed that they would help class members to receive better compensation through individual litigation than through the WCAM settlement. In total, about 25,000 class members (approximately 8 per cent of the total) opted out. Although some individual Dexia cases are still pending, this number would probably have been larger in the absence of the WCAM. After this debacle, the WCAM regulation was amended. Nowadays, pending individual cases are suspended for the duration of the WCAM trajectory, including the opt-out period.<sup>4</sup> In the DSB case (on the misselling of various financial products, inter alia, endowment policies), at least one organization set out to assist individuals in obtaining more advantageous results by rejecting and challenging the 2011 settlement as it was pending before the court of appeal to be declared binding. However, this did not lead to many opt-outs; only 300 class members (approximately 0.1 per cent of the total) opted out. It could be that the legislative amendment helped to achieve such a low opt-out ratio; it could also be the case that the DSB settlement was more legitimate than the Dexia one, and DSB’s bankruptcy undoubtedly played a role in the low opt-out ratio. In any event, apart from the Dexia case, all WCAM settlements achieved finality, which may have prevented an increase, however little or large, in regular cases to be dealt with by the courts. This would require further research, but as a start, I have presented the number of class members of each WCAM settlement in Table IX. As the ‘Size of the class’ table row shows, a substantial number of people were compensated on account of the settlements.

Given the (active) role of the WCAM judges, combined with the possibility for ‘third’ representative organizations and individuals to raise objections, a settlement is not likely to be declared binding if it concerns a frivolous claim. Moreover, it is important or even essential to reiterate that the defendant(s) act as co-initiator(s) of the request in order for the settlements to be declared binding. The power or position of a large corporation as a defendant, and its legal team, should not be overlooked

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<sup>1</sup> For a similar argument, see Tzankova & Hensler 2013.

<sup>2</sup> See Huls & Van Doorn 2007.

<sup>3</sup> See Huls & Van Doorn 2007, p. 56, and Tzankova 2012, p. 577 ff.

<sup>4</sup> See section 1015 Rv.

or underestimated, especially given the high stakes involved (see the 'Settlement amount' table row). So far, although no hard conclusions can be reached based on this study, the cases show no signs of frivolous 'litigation', nor does it seem likely that industrious entrepreneurial organizations have encouraged this within the framework of WCAM, or will do so in the future.

Nevertheless, the following observations can be made within the context of 'American situations'. To fund their activities, most representative organizations charge contributions and/or receive donations (see the 'Funding of RO's activities prior to settlement' table row). In the Dexia case, for instance, the activities of the representative organizations were fuelled by class members that paid a contribution (€ 45) or an annual fee. As part of the settlement that followed, Dexia bore the representative organizations' costs. In the Shell, Converium and DSB cases, the defendants seem to have paid (also) the costs of the settlement negotiations. For parties such as the VEB, the recovery of costs 'and something' has turned into an important method of funding its activities; over the years, they have established a war chest for future activities. In a way, defendants financially contribute to such activities. This is probably not done out of altruistic motives; it is more likely, given that the WCAM settlement will result in finality, that these parties may want to reward the non-free-riders and the organization that 'helped' obtain this finality. Or it could just be that the representative organizations were good negotiators. However, the remuneration of parties such as VEB looks like pocket money compared to US principal counsel's fees in the Shell and Converium case. As the 'RO compensated in settlement' table row shows, the fees were sizeable (\$ 47 million in Shell and approximately \$ 12 million in Converium). In the literature, a great deal of attention has been paid to these settlements due to their international character and (in Converium) the unfavourable settlement amount for non-US shareholders compared to that of US shareholders. It is somewhat odd that the size of the attorneys' fees has hardly been discussed. Such a discussion is all the more pressing considering that counsel also received a fee for their US activities. However, the representative organization's remuneration is not generally part of the court's assessment of the settlement's reasonableness (see the 'Compensation RO assessed?' table row). Whether the costs and fees are examined depends on the design of the settlement agreement. Tzankova and Hensler have observed that if parties base the payment of the legal fees on a separate agreement, there is no requirement for the court to approve the reasonableness of those fees.<sup>5</sup> Based on the seven WCAM orders, it appears that the Amsterdam Court of Appeal always first considers that the WCAM settlements should be assessed in light of the fact that, in most cases, an individual procedure would have been costly and time-consuming, and would have resulted in insecurity for the class members. As to the representative organizations' costs, in the Vie d'Or, Shell, and Vedior cases, the court also stated that these costs would not be deducted from the compensation for the class members and, therefore, the interests of the class members were sufficiently represented. The only case in which the amount of the costs and fees was assessed explicitly is the Converium case. This assessment took place because the fees would be paid out of the settlement fund and would therefore considerably reduce the class members' compensation. Among other things, the 20 per cent fee for US principal counsel was subject to the court's judgment. The court applied Dutch law, but took into account US documents and standards of reasonableness, since the legal activities mainly took place in the US and were performed by US law firms. The court ruled that the costs and fees were not unreasonable and, therefore, did not render the remaining compensation unreasonable.

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<sup>5</sup> Tzankova & Hensler 2013, p. 101.

Finally, in the currently pending Fortis settlement, the Amsterdam Court of Appeal's increasing awareness of and attention to the risks of entrepreneurial organizations was noticeable. During the hearing in March 2017, the court spent a sizeable amount of the available time on examining the involved (entrepreneurial) parties' remuneration, motives, and potential conflicts of interest, which might affect the reasonableness of the settlement. Various objections to this effect were raised by two competing representative organizations.<sup>6</sup> Another observation on this settlement is that the 'reward' for active class members that have contributed to financially enabling the settlement is taken one step further: active class members receive larger compensation than non-active class members (also known as free riders). That is, if the Court of Appeal approves this – contested – construction.

## **6.6 Summary: rules and features that shape Dutch entrepreneurial mass litigation**

In the following, I will summarize the main findings on the elements that affect the operation of entrepreneurial mass litigation in the Netherlands; the role and regulation of entrepreneurial parties and their funding arrangements, how they (might) function within the Dutch legal architecture of mass litigation and its costs, and how class members and/or defendant(s) are protected. From this overview, I will distil the rules and features that potentially mediate the beneficial or disadvantageous operation of entrepreneurial mass litigation, per addressed key issue. In Chapter 7, the rules and features of the three jurisdictions are assembled and analysed within the framework of the objectives of collective redress and the potential risks and benefits of entrepreneurial mass litigation.

The quick scan of the Dutch civil justice landscape shows an increase in privatization and a focus on a negotiated settlement, also within the context of collective redress. Various initiatives aim to balance the protection of individual rights and the efficient settlement of mass damage, and collective redress can be initiated by both public and private parties, including entrepreneurial ones. Furthermore noticeable is the increasing attention for case management tools in civil litigation, which are also employed to efficiently (timely and cost-effectively) yet justly settle mass damage. A third observation is the growing international attention to and the scope of the Dutch collective redress mechanisms, which appears to have attracted increasing activity by foreign (mainly US) legal practitioners in the Dutch market – see also hereafter.

As to the Dutch legal services market, the main observation is that it can be qualified as a relatively open one. Although attorneys have retained their monopoly in a substantial portion of civil litigation, within the context of collective redress two additional types of (entrepreneurial) parties are allowed and are active: third-party litigation funders and special purpose vehicles, which in turn can be subdivided into those that bundle assigned claims or mandates, and representative organizations. The entrepreneurial parties are active on the claimants' side of collective redress. The level of the regulation and supervision of these legal (and/or financial) services providers varies. Attorneys are bound by conduct rules and the supervision of, inter alia, their remuneration or business model, in addition to being subject to professional (liability) rules. Third-party litigation funders and special purpose vehicles that bundle claims are 'merely' subject to general civil law, such as contract and property law, (professional)

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<sup>6</sup> See also Tzankova's blog, available at <[njb.nl/blog/de-fortis-schikking.22903.lynkx](http://njb.nl/blog/de-fortis-schikking.22903.lynkx)>. For case documents, including the objectors' statements and a report of the hearing, see <[rechtspraak.nl/Uitspraken-en-nieuws/Bekende-rechtszaken/WCAM-Verzoekschrift-Ageas-SA-NV/Paginas/default.aspx](http://rechtspraak.nl/Uitspraken-en-nieuws/Bekende-rechtszaken/WCAM-Verzoekschrift-Ageas-SA-NV/Paginas/default.aspx)>.



liability rules, and corporate law and governance. Representative organizations are, in addition, subject to admissibility rules in the collective action and WCAM regulation, and to the Claimcode (non-binding self-regulation). The slowly increasing judicial scrutiny of entrepreneurial parties' ability to sufficiently protect the interests of class members – see hereafter – has so far remained limited to representative organizations that act in (court-based) collective actions and WCAM settlements. Corporate governance of, inter alia, foundations and associations in general might be enhanced after the adoption of the legislative proposal to that effect. So far, the extrajudicial activities of entrepreneurial parties have remained otherwise unregulated, and clarity is lacking as to whether financial regulation applies to their business models.

The Dutch costs shifting system renders the litigation risk (that is, the adverse costs order) rather predictable and relatively low. An eye-catching feature is the limited shift of attorney fees at the end of civil litigation. A prevailing party in collective redress will recover a fraction of its costs, although some creative routes have been observed to increase recoverability. Under certain circumstances, the initiators of collective redress can recover (part of) their own litigation costs, but it is questionable whether class members can recover contingency fees from the liable party. Case law on this matter has only recently started to develop and does not yet show a clear direction. Undue litigation conduct can be addressed with a costs sanction or damages, but case law on collective actions demonstrates that this is rarely invoked and seldom awarded. If an entrepreneurial party acts as a claimant, it is liable for the adverse costs order. Costs rules hardly enable a defendant to widen the scope of this liability to a non-party such as an individual class member. Depending on the construction with individual class members, the entrepreneurial party might be able to shift part of its litigation costs; however, this does not affect the capability of a prevailing defendant to do so. One entrepreneurial claimant has recently started to provide security for costs in specific cases, despite the absence of a legal obligation to do so, possibly incited by German case law on the validity of its business model (bundling assigned claims, see also hereafter).

Increasingly, private initiators of collective redress are experimenting with different types of litigation funding. The overview shows that entrepreneurial mass litigation is a phenomenon that does not effortlessly blend in with current legislation. So far, except for attorney fees, general guidance on (the reasonableness of) litigation funding arrangements is lacking; for now, the legislator and the courts appear to leave it to the market, contractual freedom, and the circumstances of a particular case. Initially, the courts liberally approached the entrepreneurial parties that are testing the water. The growing body of case law on collective actions and WCAM settlements nevertheless demonstrates a stricter approach slowly beginning to take shape. This is also visible in the legislative proposal on a collective action for damages. The more cautious approach is incited by the increase of entrepreneurial parties in the past decades and, more specifically, the incidents caused by such parties and the growing attention thereto. This brings me to the legal framework for Dutch collective redress mechanisms.

Three main routes to obtain collective redress have been distinguished and discussed: bundling assignments or mandates, collective action and WCAM settlement. The legislator's horizontal approach – all routes apply to all types of civil cases – leaves the collective redress landscape relatively surveyable. Traditional instruments such as joinder do exist, but are infrequently used for collective redress purposes. As mentioned, the bundling of assignments or mandates at the initiative of entrepreneurial

parties has not met with resistance from the courts, despite defence strategies directed towards dismantling this route. However, the various legal requirements regarding the validity of assignments or mandates render the bundling thereof an administratively complex and legally risky route. On the other hand, the entrepreneurial party is able to gain control over the claims – unless contractually arranged otherwise. Moreover, in this way, it can initiate a collective claim for damages. The relation between a special purpose vehicle and an individual class member is governed by contract and/or property law and, so far, no incidents of abusive behaviour have been reported.

This is different within the context of collective actions where, incidentally, entrepreneurial representative organizations have been accused of abusive behaviour. The main safeguards against such conduct are the admissibility requirements and the courts' assessment thereof. Although an entrepreneurial motive is not prohibited, since 2013 representative organizations are required to sufficiently protect the interests of individual class members. Nevertheless, representative organizations obtain standing relatively easily, even though defendants often raise objections and the courts' scrutiny seems to have increased in the past year. The current collective action regulation does not yet include an assessment of the financial means of the representative organization, but this is introduced in the legislative proposal for collective action for damages. Furthermore, publicity and transparency requirements are introduced and, to encourage initiating a collective action, a one-way full costs shifting rule in favour of (prevailing) representative organizations. In some cases, in particular those in which the aggrieved parties are consumers, the competition between various representative organizations has raised concerns. This is why the proposed collective action for damages also introduces the possibility for the court to appoint an exclusive representative organization.

The increasing scrutiny of representative organizations is also visible in the court's assessment of WCAM settlements, in particular in the last one (DSB) and the one that is currently pending (Fortis). In two settlements, US counsel were involved, including their sizeable fees. The court disregarded this in the first one (Shell), and allowed it in the second, after an assessment of the reasonableness of the contingency fees (Converium). To increase efficiency, WCAM settlements can award damages through damage scheduling. To protect their rights, individuals can raise objections against the settlement and/or chose to opt out. An obstacle to employing these instruments is the (financial) threshold of having to undertake individual action. Competing representative organizations have entered this 'market' as well, trying to incite individuals to opt out and pursue individual litigation on the basis of a contingency fee (Dexia, DSB and Fortis settlements). Nevertheless, the number of opt-outs has dropped substantially when comparing the DSB settlement to the Dexia one. Another observation on WCAM practices is that in some settlements, active class members have been able to recover their financial contribution to the representative organization they participated in. They might even be able – if the Fortis settlement is approved – to receive larger compensation than non-active class members (free riders).

As mentioned, extrajudicial activities of representative organizations have remained largely unregulated. However, one incident shows that there is a way to address abusive behaviour through corporate law: recently, participants of an entrepreneurial organization have successfully requested the court to discharge the foundation's sole board member. The statutory provision to that effect is now subject to further improvement in the pending legislative proposal that aims to enhance the corporate

governance of, inter alia, foundations and associations. Finally, it has been observed that entrepreneurial parties might also be exposed to the scrutiny of various media, such as the broadcasts of popular consumer programmes, which warn consumers against bad apples that spoil the bunch.

To conclude, Table X lists the rules and features that potentially mediate the beneficial or disadvantageous operation of entrepreneurial mass litigation, per addressed key issue.

Key issue	Distilled rule or feature
Essentials of the civil justice landscape	<ul style="list-style-type: none"> <li>- Increasing focus on the efficiency and joint responsibility of parties and court</li> <li>- Strong focus on negotiated settlement; including collective settlement</li> <li>- Increasing case management by courts</li> <li>- Increasing privatization</li> <li>- Increasing international attention</li> </ul>
The legal services market	<ul style="list-style-type: none"> <li>- Relatively open legal services market</li> <li>- Attorney monopoly in part of civil litigation, cooperate with two types of entrepreneurial parties: third-party funders and special purpose vehicles</li> <li>- Clear and strict regulation and supervision of attorneys; less so for third-party litigation funders and special purpose vehicles</li> <li>- Claimcode (non-binding self-regulation): corporate governance of representative organizations on, inter alia, the composition, tasks, and remuneration of the organizations' (supervisory) board</li> <li>- Corporate law: liability of individual board members, discharge of board members</li> <li>- Professional liability rules</li> </ul>
Litigation costs and costs shifting	<ul style="list-style-type: none"> <li>- Relatively predictable adverse costs order</li> <li>- Partial indemnification of the extrajudicial and litigation costs</li> <li>- Limited court control of litigation costs</li> <li>- Lack of clarity on the recovery of contingency fees</li> <li>- Available cost sanctions and liability for damages due to abusive litigation conduct (yet rarely invoked/awarded)</li> <li>- Limited possibility to hold a non-party liable for adverse costs order</li> <li>- Security for costs not legally required but occasionally provided in practice</li> </ul>
Private litigation funding	<ul style="list-style-type: none"> <li>- Contingency fees allowed in limited circumstances only, and rarely entered into</li> <li>- Liberal approach towards result-based fees for entrepreneurial parties other than attorneys</li> <li>- No regulation or guidance on (the reasonableness of) litigation funding arrangements</li> <li>- Little competition between third-party litigation funders</li> <li>- Competition between special purpose vehicles</li> <li>- Third-party litigation funders act as additional key player to the representative organization and its attorney</li> </ul>

Specificities and safeguards of the collective redress mechanisms	<ul style="list-style-type: none"> <li>- Rules on the standing of entrepreneurial parties</li> <li>- Liberal judicial assessment of rules on the standing of entrepreneurial parties</li> <li>- Development of a 'claimants' bar'</li> <li>- Creative judicial interpretation of cost rules in collective actions</li> <li>- Relatively high fees as part of WCAM settlements</li> <li>- Limited but increasing judicial assessment of entrepreneurial parties' remuneration in WCAM settlements</li> <li>- Proposed legislation on the disclosure of the identity of the entrepreneurial party, its financial means and/or its funding arrangement (to the court only)</li> <li>- Proposed legislation on the appointment of an exclusive representative organization</li> <li>- Possibility to stay individual proceedings</li> <li>- Possibility to raise objections (professionally) against a WCAM settlement</li> <li>- Media control on representative organizations that represent aggrieved consumers</li> <li>- Both ad hoc entrepreneurial parties and repeat players</li> <li>- Appointment of a trustee and/or claims administrator</li> <li>- Rewarding active class members</li> </ul>
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Table X: Dutch rules and features that potentially mediate the benefits or drawbacks of entrepreneurial mass litigation

### **Part III: Analysis, Conclusion and Summary**



## **7 Analysis and conclusion**

### **7.1 Introduction**

This chapter brings together the findings of the previous chapters. By doing so, it addresses the main research question: what conditions are relevant in assessing the likelihood of entrepreneurial parties contributing to the chosen objectives of collective redress? This will be done in three steps.

First, in section 7.2, the results of part I of the research will be reiterated: the policy objectives of collective redress mechanisms in the selected jurisdictions and the European Union (sub-question 1, Chapter 2), the benefits and drawbacks of entrepreneurial mass litigation, and whether they positively or negatively affect the chosen policy objectives (sub-question 2, Chapter 3). The policy objectives have been distilled from policy documents from the respective legal regimes, supplemented by relevant theoretical literature. The potential effects of entrepreneurial mass litigation (the benefits and drawbacks) have been drawn from the vast experience gained by the USA and Australia with entrepreneurial mass litigation (contingency fees, third-party funding and class actions). This experience has been used as a source of inspiration to create a framework for entrepreneurial mass litigation that fits within the context of (the selected) European jurisdictions' legal culture and traditions. The policy objectives serve to qualify the effects of entrepreneurial mass litigation, that is, they determine which particular effects that have been described in the literature are favourable and can thus be qualified as a benefit, and which are not – the drawbacks. The benefits and drawbacks will serve as touchstones to qualify a specific rule or feature as an opportunity or a threat (see hereafter).

The second step, presented in section 7.3, presents the results of the legal studies in part II of the research. As the actual functioning of entrepreneurial mass litigation depends on the specific features of a national legal system, part II has examined the key issues that affect the operation of entrepreneurial mass litigation in Germany, England and Wales, and the Netherlands (sub-question 3, Chapters 4-6).<sup>1</sup> The section summarizes the main findings from these legal studies and presents the rules and features that are closely connected with and shape entrepreneurial mass litigation.

The two former steps lead to the third and last one in section 7.4, which brings together the findings of both parts of the research. The varying legal strategies that the selected jurisdictions have so far employed provide a mine of information on the – potential – regulation and operation of entrepreneurial mass litigation. In this third part, the rules and features that have been described in the previous part are abstracted from their national context. In that sense, the country reports have also served as case studies, from which information has been collected on whether specific benefits and/or drawbacks might or indeed do take place. Does a specific rule or feature (potentially) amplify or reduce the benefits or drawbacks, which, in turn, positively or negatively affects the objective(s) of collective redress, and thus qualify as an opportunity or a threat to the functioning of entrepreneurial mass litigation (sub-question 4)? This third part then presents an overview of the potential threats and opportunities in relation to the benefits and drawbacks of entrepreneurial mass litigation, the objectives of collective redress, and the manner in which all are intertwined. It aims to answer the main research

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<sup>1</sup> On the specific key issues, see section 7.3.1.

question and to provide a framework for weighing and balancing the benefits and drawbacks of entrepreneurial mass litigation. The framework displays the three sets of building blocks of entrepreneurial mass litigation: a) the rules and features, qualified as either an opportunity or a threat to b) the benefits and drawbacks of entrepreneurial mass litigation, c) modelled within the policy objectives of collective redress. It shows whether a specific rule or feature forms a threat or an opportunity to the beneficial or disadvantageous effect of entrepreneurial mass litigation, which in turn can positively or negatively affect the chosen objective(s) of collective redress mechanisms. The overview also demonstrates the potential trade-offs of specific rules or features. For instance, competing entrepreneurial parties might initiate various actions that concern the same mass damage event. Such competing actions harm the objective of efficiency, and can thus be considered a drawback. It has been observed that appointing a lead representative might reduce this drawback. Hence, the ‘lead representative rule’ can be qualified as an opportunity for the drawback of inefficient competition that, in turn, positively affects the policy objective of efficiency. However, the same rule can also be qualified as a threat to the benefit of (price) competition, as it might reduce the number of competing entrepreneurial parties. Normally, such competition positively affects the objective of compensation; if reduced, it does not.

## **7.2 Policy objectives and potential benefits and drawbacks**

### **7.2.1 The policy objectives of collective redress mechanisms**

*Part I of the thesis, which consists of Chapters 2 and 3, has established the foundation for the research. Within this part, Chapter 2 has addressed the first sub-question: which policy objectives underlie the collective redress mechanisms in the selected jurisdictions, as well as the European Union policy on collective redress?*

The overview of the collective redress mechanisms that have been developed since the 1970s shows that various routes can lead to the settlement of mass disputes.<sup>2</sup> Currently, 11 instruments are available in the three selected jurisdictions to obtain collective redress, and two new ones are in the making. Although the German, English, and Dutch mechanisms vary significantly, three common main policy objectives have been identified: i) to modify – potential – wrongdoers’ behaviour (prevention and deterrence), ii) to restore the damage suffered by individual class members (compensation), and iii) to promote procedural economy (efficiency). These objectives follow from the need to settle mass harm disputes in an effective and efficient manner, more so than individual dispute resolution has been able to achieve. Unlike some policy documents, this research has not considered access to justice as a separate objective of collective redress, but rather as an overriding objective or a means to an end in order to achieve the aforementioned objectives. Inasmuch as access to justice is not yet addressed by the mere existence of a collective redress mechanism (effective access to a remedy) and its design (fair process), the procedural side of access to justice is considered part of the objective of efficiency (timely and affordable access, rectitude of outcome). The substantive side of access to justice can be recognized in the objective of compensation (fair redress). Access to justice has also been addressed within the benefits and drawbacks of entrepreneurial mass litigation, as entrepreneurial parties potentially

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<sup>2</sup> See Chapter 2, Table I.



enable claimants to file a claim, and might improve or deteriorate fair dispute resolution (equality of arms, respectively abusive litigation).

The traditional mechanisms of collective redress mainly focus on addressing and modifying – potential – wrongdoers' behaviour and incentivizing them to comply with, for instance, consumer law. This more abstract objective focuses on the interests of society at large rather than on individual redress. As of the 1970s until recently, prevention and deterrence have been the prime objectives of collective redress; this policy has developed in a rather similar way in the legal regimes researched. The primary chosen remedy to achieve such an objective was injunctive relief, brought by (semi-)public enforcers. It is relatively recently that providing individuals with the opportunity to obtain individual redress or compensation has gained ground as an objective of *collective* redress. Previously, the right to seek redress was an individual's prerogative. Nowadays, deterrence is still considered an important objective, but one to be pursued primarily by (the enforcers of) public law. Within the context of collective redress, it is regarded as a positive side effect that occurs when wrongdoers compensate aggrieved parties and therewith internalize the damage that they have caused. The third objective, efficient dispute resolution, has developed independently from the former two, incited by inefficient rather than ineffective enforcement. It has been a constant objective, aimed at by most mechanisms that have been designed over the years. Efficiency or procedural economy is a broad term, and entails administrative efficiency to protect scarce judicial resources: a large number of claims, or essential questions that relate to these claims, are adjudicated *en masse*, overflowing court dockets are therefore avoided and the uniformity of judgments is improved. Moreover, the aggregation of claims aims to result in adjudication within a reasonable period of time at decreased costs and efforts due to economies of scale. Third, it provides closure, peace or finality for all parties involved. Hence, this objective serves both individual and public interests.

### 7.2.2 The potential benefits and drawbacks of entrepreneurial mass litigation

*The second part of Part I of the thesis, Chapter 3, has concentrated on entrepreneurial parties that (might) operate in the collective redress market. The chapter has described the – potential – benefits and risks that are associated with entrepreneurial mass litigation (sub-question 2). In Chapter 3, they have been presented as more or less opposite sides of the same coin (see also Table XI in section 7.2.3). In the following, both sides have been paired and summarized under five themes.*

Entrepreneurial mass litigation has been defined as the non-recourse financing of (all or part of) the costs of mass litigation by a private party that is otherwise unconnected with the mass damage event, in return for a share of the proceeds of the action or an uplifted fee; either way, only payable upon success. Such funding can take various shapes. This research has distinguished three types of entrepreneurial parties that operate within the context of mass litigation: attorneys, ad hoc special purpose vehicles (SPVs) and third-party litigation funders.<sup>3</sup> They can be subdivided into passive and active ones, although in practice the dividing line is not always easily drawn. Passive entrepreneurial parties' main role is to fund the action; they are regularly informed but not actively involved in litigation strategies and decision-making. An active entrepreneurial party is involved in litigation strategies and decision-

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<sup>3</sup> On their funding techniques, see section 7.3.4.

making, searches for potential claims, screens cases, invests in developing the action on its own initiative, approaches and informs potential claimants, and possibly initiates mass litigation itself. Both types have in common that they provide or endorse a platform to assemble class members and increase leverage to pursue collective redress, in order to, eventually, profit from the action in the case of success.

#### *Access to justice*

Entrepreneurial parties can fuel access to justice and reduce the free-rider problem that is said to be an impediment to the functioning of collective redress. They might actively find and approach potential claimants (or their attorneys), and inform them of the opportunity to join the action. Furthermore, as the threshold to participate is low (no costs unless the action is successful), class members will be more easily incentivized to participate in the action. This increases access to justice, and benefits the objective of compensating aggrieved parties. Furthermore, it might benefit the objective of deterrence as the number of participants increases, and, thereby, the potential internalization of damage is high. On the other hand, increasing access to justice might create or sustain a claim culture, in which citizens claim for damages on a regular basis and for high amounts. Claim culture is a broad and somewhat vague concept, but in the legal atmosphere this risk is said to entail an increase in (the size of) claims. Such culture might impose high costs on industry. The fear of litigation might have a deterrent effect, but might also lead to defensive behaviour, the costs of litigation or compensation being redistributed, high insurance costs, or have a negative impact on innovation. These effects might increase courts' workload (inefficiency), deteriorate a jurisdiction's business climate, lessen trust in its judicial and legal system, and impose disproportionate costs on industry (overdeterrence and unfair compensation).

#### *Market mechanisms*

The inclusion of entrepreneurial parties adds another player in the market that might compete not only with other entrepreneurial parties, but also with traditional legal services providers such as attorneys and (semi) public organizations. In such a competitive market, aggrieved parties have more choice and might get a better deal. If more parties detect and try cases, and a better or best possible fee arrangement and quality of litigation are available for class members, this is beneficial to the objectives of deterrence, compensation and efficiency. However, competition between entrepreneurial parties might lead to a race to the bottom, that is, when insufficient transparency creates confusion for consumers as to whom to trust or in which organization to participate, and defendants see themselves confronted with various parties that all state that they are protecting the interests of the class members. Competition is also disadvantageous if various entrepreneurial parties bring various actions after a single mass damage event. Such a multiplicity of proceedings negatively affects the objective of efficiency as it leads to more cases, increased costs for parties and society, possibly inconsistent adjudication and finality problems.

#### *Quality of claims*

The screening of cases and due diligence assessments by entrepreneurial parties are said to improve the quality of claims that are brought before the courts. Entrepreneurial parties thoroughly investigate the claims as well as the financial means of the defendant (whether a settlement award can be recovered), and whether negotiation rather than litigation can lead to the resolution of the dispute. This benefits the objectives of compensation (fair compensation), deterrence (reducing frivolous claims and therewith overdeterrence) and efficiency (no excessive, frivolous litigation). Nevertheless, the

thorough screening of cases might also lead to adverse selection or cherry picking: only particular cases are selected. Entrepreneurial parties might not select the low value yet high merits claims, or claims that fail to acquire sufficient media coverage due to the relatively low return on their investment or litigation risks. They might also only target the – most – creditworthy defendants, the ones with the deepest pockets. This can only be considered a risk, however, if alternative routes or initiators to obtain (collective) redress are unavailable. Hence, the benefit of improving access to justice (and therefore with the objectives of compensation and deterrence) might be limited to certain types of cases.

#### *(E)quality of arms*

Closely related to the previous theme is the professionalism of entrepreneurial parties and the quality of their representation or assistance. In addition to the attorney, they might manage the litigation (budget), assist or instruct lawyers, and assist and inform claimants. They are often repeat players and have a team and a network of experts to help build and litigate the claim. As an entrepreneurial party might have a handsome war chest, strategic tactics from defendants to try and subdue or intimidate claimants are less likely or ineffective. This creates a more level playing field between claimant and defendant (equality of arms). Hence, the professionalism of entrepreneurial parties might enhance the objective of efficiency in various ways. On the other side of the coin, a risk exists that an entrepreneurial party engages in abusive behaviour. It might pursue an unmeritorious claim with the intention of coercing the alleged wrongdoer into a settlement in order to prevent a worse scenario, such as high litigation costs or reputational damage. Abusive conduct can, furthermore, be displayed by way of aggressive marketing/selling tactics to try to find claims and claimants in every possible way (ambulance chasing). Third, an entrepreneurial party might put forward an empty shell or not have sufficient financial means to completely fulfil its promise. This risk entails three aspects. From the side of the defendant, there is the risk of not being able to enforce the costs award in case he wins. From the side of the class members, a settlement or award paid to the entrepreneurial party or empty shell might evaporate in the case of insolvency or fraud, or the entrepreneurial party might lack the financial means to fully pursue or support the action. Abusive behaviour affects the objectives of (fair) compensation, deterrence (overdeterrence), and efficiency (excessive, frivolous litigation).

#### *Interests, control and monitoring*

Finally, the contingency aspect of a litigation funding arrangement aligns the interests of the entrepreneurial party and its clients. They both prefer an award that is as high as possible in a speedy, inexpensive and efficient way. If the entrepreneurial party is an additional party, such as a third-party funder, it can also monitor the attorney's or representative's actions. All this mitigates the problem that the individual or group does not have perfect information on or cannot fully monitor the actions of the funder, and thereby improves the objectives of compensation, deterrence and efficiency. However, there is a risk that the interests are not sufficiently aligned. The size, complexity and costs of mass litigation might still incentivize an entrepreneurial party to act in its own interest: to ensure a – sufficient – return on its investment, possibly at the expense of class members' interests. This conflict of interests might enhance the risk of an inadequate settlement: a premature or collusive settlement. In both situations, the amount of the settlement is set too low, and therewith obstructs the objectives of (fair) compensation and/or deterrence (underdeterrence; such a settlement does not force the defendant to internalize all of the damage caused), while it benefits the entrepreneurial party.

### 7.2.3 The first overview: the beneficial or disadvantageous effects of entrepreneurial mass litigation

The benefits and drawbacks of entrepreneurial mass litigation can be presented as more or less opposite sides of the same coin, which can positively or negatively affect the objective(s) of collective redress mechanisms: deterrence (a), compensation (b), or efficiency (c):

Potential benefits	Affected objective(s) (+)	Potential drawbacks	Affected objective(s) (-)
1. Facilitate access to justice	a, b	6. Fuel a claim culture	a, b, c
2. Competition	a, b, c	7. Inefficient competition	c
3. Increase the quality of claims	a, b, c	8. Adverse selection / cherry picking	a, b
4. (E)quality of arms	c	9. Abusive behaviour	a, b, c
5. Alignment of interests	a, b, c	10. Conflict of interests	a, b

Table XI Effects that positively (+) or negatively (-) affect the objectives of collective redress mechanisms

## 7.3 The selected jurisdictions' rules and features that are related to entrepreneurial mass litigation

*Part II of the research has investigated the legal rules and features that are closely connected with and shape the operation of entrepreneurial mass litigation in three European legal regimes: Germany (Chapter 4), England & Wales (Chapter 5), and the Netherlands (Chapter 6) (sub-question 3). After a brief introduction into some of the jurisdiction's civil justice settings, each chapter has addressed the relevant national regulation and case law on the following key issues of entrepreneurial mass litigation (on the selection, see also section 3.6): the legal services market in which entrepreneurial parties (might) operate, the litigation funding regime, the litigation costs and costs shifting, and the specific features of the collective redress mechanisms that affect the functioning of entrepreneurial mass litigation. In the following sections, the main findings of the country studies are summarized. Subsequently, section 7.3.6 presents the rules and features that have been found to – potentially – affect the operation of entrepreneurial mass litigation.*

### 7.3.1 Setting the scene: some essentials of the civil justice landscapes

In the past two decades, the three jurisdictions have all engaged in civil justice reforms. Not uncommonly, these reforms went hand in hand with austerity measures, such as decreasing government expenses on public legal aid and increasing court fees. In general, the reforms emphasize efficiency, more specifically with regard to the duration and costs of dispute resolution. The emphasis on efficiency is visible in various aspects of civil justice and procedure. One of the main features is the changing role of the judiciary. Courts have been given more discretionary powers, that is, more focus is placed on case management and tools to, where possible, speed up litigation and reduce costs. For instance, the English overriding objective dictates that courts deal with civil cases justly and at a proportionate cost, and as a derived case management tool the court can prompt parties to prepare litigation costs budgets – which are then subject to court approval. It has been argued that such powers have limited or even diminished party autonomy; a more neutral vision is that, nowadays, litigation is a shared responsibility between courts and litigants. The emphasis on efficiency is also visible in the

growing attention to ADR and, within judicial dispute resolution, the various incentives to settle amicably rather than to continue litigation. For instance, German litigants might receive a 'bonus' costs award if they settle.

The extent to which efficiency has become an accepted aspect of dispute resolution and, more specifically, has shaped collective redress, nevertheless varies between the three investigated jurisdictions. The Netherlands and England and Wales seem to have been more receptive towards developing collective redress mechanisms and accepting the inherent trade-offs between the objectives of efficiency, deterrence and/or compensation. For instance, in both jurisdictions, a court can declare a settlement between one or more model claimant(s) or representative organization(s) and the defendant(s) to be binding. If such a settlement is declared binding, all class members are bound, unless they opt out. This settlement is the result of the involved parties' negotiations and their assessment of the potential litigation proceeds and risks, and generally focuses more on an efficient settlement (as to time, costs and finality) rather than the full compensation of the individuals' – alleged – damage. A difference between the two jurisdictions is that the Dutch, as of 1994, have taken a horizontal approach towards collective redress (the collective action and WCAM both apply to all types of civil cases), whereas the English instruments are more scattered, and the ones that provide for compensatory relief only apply to consumer and competition law cases. Germany, too, has implemented a mechanism for a court-approved collective settlement (KapMuG), for capital investors' claims. However, so far, Germany has maintained its strong(er) focus on the protection of individual rights such as party autonomy and the right to be heard. This is visible in the design of the scattered collective redress mechanisms as well as in the courts' application of rules of both substantive and procedural civil law. Two notable cases are the Deutsche Telekom case (KapMuG) and the CDC case (assignment of claims to an SPV). These cases show a more formal and strict (application of) civil law and less use of case management techniques, in contrast to comparable Dutch and English cases. In the latter cases, the courts have displayed more flexibility, with a strong(er) focus on efficiency and their discretionary case management powers. The German combination of liberal individualism, the (courts' interpretation of) specific rules of civil law that concern (entrepreneurial parties' involvement in) collective redress, and a strong industry lobby seem to have created a less fertile breeding ground for entrepreneurial mass litigation as compared to the other two jurisdictions. German collective redress instruments do exist and cover various sectors, but the objective of controlling and modifying – potential – wrongdoers' behaviour remains the leitmotiv, rather than that of compensation.

### **7.3.2 The legal services markets**

Important for the development and functioning of entrepreneurial mass litigation is the organization of the legal services market. Entrepreneurial parties will not (easily) participate in this market if the entry barriers are (too) high, that is, for those that – also – provide legal services. In addition or alternatively, entrepreneurial parties might be governed by financial services regulation. As mentioned, within the context of mass litigation, three types of entrepreneurial parties have been distinguished: attorneys, special purpose vehicles and litigation funders. The country studies show that the jurisdic-

tions are still somewhat struggling with the qualification of the various types of entrepreneurial parties, as it is not always clear cut whether they are acting as legal or financial services providers. Often, it simply boils down to the specific circumstances.<sup>4</sup>

Regular professional liability rules aside, attorneys are governed by professional standards on, inter alia, integrity and independence, publicity, and funding arrangements, pursuant to European and national regulation regarding the legal profession. Furthermore, public bodies fulfil supervisory roles. A comparison between the three jurisdictions shows that the German legal services market is the most strictly regulated one for providing legal services both in and out of court. Although German attorneys' market powers have been slightly reduced in the past decades, there is still little room for other types of representatives to engage in legal services. Within the context of collective redress, the main exception is the authority of (non-profit) consumer organizations to represent consumers if the action is necessary to protect consumers. Furthermore, the professional debt collection of assigned claims is considered a legal service, and a party may provide such a service within the limits of the Legal Counsel Act. This includes authorization by a public body in advance as well as judicial scrutiny during litigation. However, such parties' involvement (as an SPV) in collective redress is restricted.<sup>5</sup> In comparison, the Dutch legislator and the courts have been rather liberal towards (entrepreneurial) representative organizations that are active in the collective redress market as SPVs (and, normally, are represented by an attorney and possibly backed by a litigation funder). Nevertheless, in past years, the collective action regulation has been refined, and recent evidence demonstrates the Dutch courts' growing scrutiny of (entrepreneurial) representative organizations – possibly limiting their access to the collective redress market.<sup>6</sup> For providing legal services within the context of collective redress, both in and out of court, representative organizations might also be regulated by the Dutch Claimcode. This is a self-regulatory initiative that aims to provide consumers with more clarity and guarantees on the organizations that act on their behalf. The code consists of governance provisions on, inter alia, the composition, tasks, and remuneration of the organizations' (supervisory) board. So far, however, not all organizations comply with the code (nor do they explain why they do not do so), and there is no supervisory body other than the courts that deal with a specific collective action or WCAM settlement. In England and Wales, solicitors and barristers no longer have a full monopoly over legal representation. Within the context of collective redress, Claims Management Companies (CMCs) are alternative legal services providers, mainly in the area of personal injuries and financial products and services. CMCs are licensed by the public authority Claims Management Regulator (CMR), which also has supervisory powers. The CMR has issued ethical and professional rules and guidelines for CMCs that cover, inter alia, rules on advertising, advice, representation, claims referrals, and the handling of complaints.

So far, third-party litigation funding is a small, but growing market. Both in England and Wales and in Germany, third-party litigation funders have become accepted entrepreneurial players in the legal services market, whereas third-party litigation funding in the Netherlands is still in its infancy. The presence of third-party litigation funders within the context of mass litigation is less observable. However,

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<sup>4</sup> See also section 7.3.4.

<sup>5</sup> See also section 7.3.4.

<sup>6</sup> See also sections 7.3.4 and 7.3.6.

it appears to be a growing market as well. Illustrative is the Volkswagen case, in which various types of entrepreneurial parties from various jurisdictions are active, including third-party litigation funders that cooperate with law firms.<sup>7</sup> In none of the three jurisdictions are third-party litigation funders governed by legal or financial services regulation. So far, they are governed, if at all, by self-regulatory instruments and, in specific cases, are overseen by the courts. This is the case in England and Wales, where the Association of Litigation Funders (ALF) has issued the Code of Conduct for Litigation Funders to regulate its members. The code addresses the capital adequacy of funders, the termination and approval of settlements, and control over litigation or settlement negotiations. However, not all litigation funders that are active in the English market are members of the ALF.<sup>8</sup>

### **7.3.3 Litigation costs and costs shifting**

The operation of entrepreneurial mass litigation is also affected by the following two key factors of civil litigation: a legal regime's system of litigation costs and the way these costs are shifted between parties at the end of litigation. In all three jurisdictions, court (or tribunal) charges are statutorily fixed, and the loser pays rule applies, which dictates that, generally, the losing party pays the prevailing one's litigation costs. The similarities between the jurisdictions with regard to litigation costs and costs shifting end there, however. As the country studies have shown, various differences exist between the three jurisdictions with regard to the regulation of attorney fees, the complexity and predictability of the costs shifting system, and its safeguards against abusive litigation.

First, differences exist with regard to the regulation of attorney fees. In Germany, just as the court charges, these legal expenses are fixed by law. Both court charges and attorney fees are tied to categorized amounts in dispute, and the litigation (cost) risk can thus be calculated in advance. By contrast, in England and Wales and in the Netherlands, attorney fees are unregulated and, thus, are freely negotiable between attorneys and clients. Furthermore, various differences exist with regard to the effect of the loser pays rule. In the Netherlands, save for exceptions that are irrelevant here, only a part of the successful party's attorney fees will be reimbursed by the losing party. The amount recoverable depends on the amount in dispute, the number of procedural actions, and the nature of the services, and may vary between 25 to 90 per cent of the actual costs. In mass litigation specifically, the costs award will often be a fraction of the actual costs incurred. By contrast, a full indemnity rule applies in England & Wales and in Germany. Normally, all litigation costs are shifted. In Germany, the calculation (in advance) of the costs order – and thus the cost risk – is a relatively simple matter. This is rooted in the regulatory fixation of both court charges and attorney fees, and the strict (application of the) rules for the distribution thereof at the end of litigation. At the other end of the spectrum, English bookshelves bulge with fancy-covered lengthy tomes on civil litigation costs. The main elements that shape its complexity and unpredictability are the freely negotiable attorney fees and the courts' discretionary power as to whether costs are shifted from the prevailing to the losing party, and if so, which costs and what amount. The legal system of England & Wales is therefore not only notorious for its high litigation costs (and inherent cost risk), but also for its satellite litigation over costs.

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<sup>7</sup> See Chapter 3, Tables II and III.

<sup>8</sup> On the judicial oversight of third-party litigation funders, see section 7.3.4.

For collective redress, various specific rules on costs and costs shifting apply. This is related to the high litigation costs (both the court charges and the attorney and expert fees), and the difficulty of redistributing these costs between the class members. In Germany, in competition law cases the possibility exists for a court to take the claimant's economic situation into consideration and it may lower the recoverable charges and fees if it deems this to be necessary. By reducing the litigation costs risk, this provision aims to stimulate private enforcement. In the Netherlands, the complexity and inherent costs of collective actions have given courts cause to increase the recoverable costs award for prevailing claimants. Furthermore, the recent legislative proposal for a collective action for damages entails a one-way full indemnity costs shifting rule in the claimants' favour (only the defendant can be ordered to pay the full adverse costs). An important safeguard in jurisdictions with a high cost risk, such as in England and Wales, is the security for costs that covers a potential adverse costs order. A related safeguard is the ATE insurance that – also – covers a potential adverse costs order, which is available in England and Wales as well. However, given the high litigation costs and the inherent high insurance premium, such insurance might not be readily available for mass litigation. In the Netherlands, the cost risk is (relatively) low. Nevertheless, in practice, the instrument of security for costs has been used in mass litigation, even though a claimant is not legally required to provide such security.

#### **7.3.4 Private litigation funding**

In the USA, entrepreneurial litigation or lawyering usually refers to attorneys that operate under a contingency fee arrangement. Within the context of mass litigation (class actions), such an arrangement is not allowed, but it has been 'reconstructed' into the common fund doctrine. This doctrine ensures class counsel's 'reasonable fee', which is paid out of the class action's proceeds (the common fund) and is assessed by the court. Generally, save for some exceptions that are irrelevant here, in all three European jurisdictions attorneys are not allowed to operate under a contingency fee arrangement. The main reason for this ban is that such an arrangement would generate perverse incentives that conflict with the attorney's independence. However, since the 1990s, all jurisdictions have allowed different but rather similar kinds of funding arrangements. This development has been stimulated by the considerably high litigation costs, particularly in mass litigation, and the 'loser pays' costs shifting rule,<sup>9</sup> as well as by the decreasing possibilities for individuals to apply for public legal aid funding. Consequently, incited by the potentially large return on investment and using the umbrella of promoting access to justice to justify their business models, various types of entrepreneurial parties have started to test the water in the collective redress market: attorneys, SPVs and third-party litigation funders. All of these parties have in common that they operate under contingency fee-like arrangements. They finance the costs of mass litigation, in return for i) a share of the proceeds of any award or settlement regardless of the amount of time spent on the case, or ii) an uplift, in terms of a percentage, of their normal, hourly fee (conditional fee). Either way, the (uplifted) fee is only payable upon success. In this way, all three types of entrepreneurial parties fund mass litigation, and some are also actively involved in the proceedings and inherent decision-making processes.

More specifically, the following funding techniques have been distinguished in the three country studies. First, entrepreneurial parties can enter into a settlement agreement with the defendant(s) and negotiate their fee to be paid out of the action's proceeds, either as a percentage of the proceeds or

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<sup>9</sup> See also section 7.3.5.



as a fixed amount. Such a common fund-like technique has been used in the Netherlands by (US) attorneys, SPVs and third-party litigation funders in several WCAM settlements. A notable finding in these cases is that the court's assessment of such payment, if controlled at all, is only marginal. Some non-entrepreneurial Dutch SPVs have been found to conclude such a payment as well, which they then use to bolster their reserves (war chest). In Germany, consumer organizations might be able to negotiate such a payment; however, they cannot use it to bolster their war chest since any proceeds from their actions need to be turned over to the federal purse. It is not inconceivable that settlements as described here are concluded out of court as well. Evidence thereof, however, is difficult to detect and, thus, such practices would remain largely under the radar of legislators and/or courts. This is different if the settlement acquires – positive or negative – media coverage, of which some examples have been presented. A notable example is the Dutch *Woekerpolis* case, where various (entrepreneurial) SPVs have set out to represent aggrieved consumers, with varying results and, not uncommonly, have been accused of mainly focusing on their own interests rather than those of the consumers.

A second type of funding technique is constructed as follows. An SPV or third-party litigation funder can act as or be involved in a representative organization that represents its members – individual class members – who are required to conclude an individual participation agreement with the representative organization.<sup>10</sup> Such a contractual arrangement then includes a contingency (like) fee agreement. This, too, has been observed in the Netherlands, both in collective actions and in WCAM cases. Such a construction has remained unregulated by law or otherwise, unless an attorney is involved. An important safeguard against abusive behaviour is the judicial scrutiny of the (professionalism and)<sup>11</sup> remuneration of entrepreneurial parties. In the Netherlands, so far, hardly any court control of the payment has been observed. The Dutch courts seem to have increasingly grown accustomed to case-managerial tasks, but appear less prone to assessing the remuneration of entrepreneurial parties. It has been argued that in the Netherlands, freedom of contract applies to settlements and, thus, to the ways of financing that settlement, as long as it is not an attorney who receives the percentage of the claim awarded. By contrast, in England & Wales, a funder's fee arrangement (and the recoverable fee)<sup>12</sup> might be thoroughly assessed, also at separate cost trials.

Third, individual class members can transfer their claim or right of action to an SPV or a third-party litigation funder, which then bundles the claims and pursues the action in its own name. Such a (contractual) arrangement can include a contingency (like) fee arrangement. This construction has been tried in all three jurisdictions. An important legal aspect here is the alienability of claims or causes of action.<sup>13</sup> As the relevant rules in the three jurisdictions diverge, so have the results in specific cases. In England and Wales, due to the remains of the common law torts of maintenance and champerty, such a contract might be found to be contrary to public policy and, thus, it will be unenforceable.<sup>14</sup> Entrepreneurial parties are only allowed to conclude such a contract if they have a 'genuine commercial

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<sup>10</sup> On the representative action, see also section 7.3.6.

<sup>11</sup> See also section 7.3.6.

<sup>12</sup> See section 7.3.5.

<sup>13</sup> On the subsequent amalgamation of the claims into one action, see also section 7.3.6.

<sup>14</sup> Maintenance is 'intermeddling' in the litigation of a third party with no other interest than its own: profiting from another man's claim. Champerty is a species of maintenance, and refers to the situation in which a third party helps pursue the litigant's claim in exchange for a share of the proceeds. See section 5.3.2.

interest'. A genuine motive, a concern for the litigant's right or a genuine interest in the outcome, is one that does not 'stir up strife', that is, encourage litigation that would otherwise not have been commenced. Nevertheless, recent case law shows that English courts are progressively narrowing the scope of the rules, shifting in favour of third-party litigation funding. However, this case law mainly concerns individual litigation. Moreover, for the collective proceedings in competition law cases, the legislator has explicitly excluded private parties such as legal firms, funders, and special purpose vehicles from bringing such proceedings. A similar development is visible in Germany. Although German law does not recognise the aforementioned torts, and to a certain extent has accepted individual litigation funding, the bundling of contractual assignments as a method to fund mass litigation has met with resistance from the courts. In Germany, the question of who can bring (amalgamated) assigned claims is related to the strictly regulated legal services market and the fundamental principle that civil justice should serve the protection of individual rights. Normally, only a person whose individual rights are at stake has standing to bring the ensuing claim. Only by way of the aforementioned regulated exception in the Legal Counsel Act can a third party enforce such a right in its own name. Notably, in the cement cartel case brought by an SPV that represented several class members, the court declared the assignments at hand void due to a violation of public policy. They were found to infringe the – constitutional – principle of an even distribution of the cost risk. In light of this principle, assignments should not be (ab)used in a manner that deprives the defendant of forfeiting a costs award; it should be avoided that a party without sufficient funds is pushed forward as a litigant. It has been argued, however, that the dismissal of this method is mainly attributable to the German hesitance towards collective redress. In the Netherlands, the courts have so far allowed assignment as an instrument to obtain collective redress. Dutch law does not recognise the torts of maintenance or champerty, and the courts have also not found that these constructions infringe public policy – even if German law was applicable, as was the situation in the paraffin cartel case that was brought before a Dutch court. Aside from the aforementioned more liberal approach towards collective redress, it might have been relevant here that the SPV at hand had provided security for litigation costs to address a potential costs award, and that the cost risk (the potential costs order) is much lower in the Netherlands than it is in Germany.<sup>15</sup>

### **7.3.5 Specificities and safeguards of the collective redress mechanisms**

Three types of collective redress mechanisms have been identified in which entrepreneurial parties can play a role. The routes vary in the sense that the formal parties to litigation differ. Furthermore, they only concern those mechanisms that – eventually – will lead to compensatory relief, as an entrepreneurial party will only engage in mass litigation if it can obtain a return on its investment. It depends on the type of route which safeguards exist to protect the (absent) class members and/or defendants against the risks of entrepreneurial mass litigation, such as unfounded claims or a conflict of interest between an entrepreneurial party and the class members.

The first suitable mechanism is a representative action. There are two variations of this action. In both, the entrepreneurial party acts as or is involved with the representative, which is the formal party to the litigation, rather than all class members. First, the entrepreneurial party can (in)directly establish the 'statutorily allowed' representative organization. This organization is the claimant that represents

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<sup>15</sup> See also section 7.3.5.

or protects (a part of) the class, but is not a class member itself. Although representative actions might only provide for declaratory (or injunctive) relief, the aftermath – negotiations or individual litigation for damages – of a declaratory judgment can ensure the proceeds of which the entrepreneurial party can claim its stake. Currently or theoretically (not all jurisdictions allow an entrepreneurial party to share in the proceeds),<sup>16</sup> the national mechanisms that fall within this category are the Dutch collective action and WCAM, the English enforcement order, the opt-in and opt-out collective action and the opt-out collective settlement regulation for competition law cases, as well as the German Gewinnabschöpfungsklage and Einziehungsklage. These statutorily-based mechanisms have been specifically designed for collective redress. The second variation of the representative action has been created in practice, through the underlying mechanism of bundled assignments. This ‘opt-in’ instrument can be employed by a third-party funder or an SPV, which becomes the owner of the claims or causes of action and, thus, brings the action in its own name. Through the underlying construction, however, the class members still have a stake in the action and are thus represented by the entrepreneurial party that ‘merely’ steps in as a third party to obtain compensation for the original claim owners, the class members – and acquires part of the proceeds for itself. So far, the instrument has been used by entrepreneurial parties mainly in competition law cases, which can be explained by the fact that such cases usually concern a limited number of aggrieved parties which can be relatively easily identified.

For the statutorily-based representative actions, the following safeguards against abusive behaviour have been found: the qualification of the representative organization in advance, the rules – and the interpretation thereof – on standing, the distribution of the litigation costs and risk, and the regulation on the protection and distribution of the proceeds. In England and Wales and in Germany, only qualified representative organizations can act as such. The relevant regulation leaves little room for entrepreneurial parties to act as a representative. In Germany, some possibilities exist, but the regulation entails a strict assessment of the professionalism of the organization, the number of members they represent, and the organization’s financial means. In both jurisdictions, however, the presence of entrepreneurial parties in the shadow of the action remains unclear. In England and Wales, claimants are not required to disclose the identity of third-party funders; nevertheless, in some cases the courts have ordered a claimant to do so. In the Netherlands, representative organizations are not designated in advance by a public authority, but are assessed in a specific case before the court. As mentioned, the Dutch legislator and the courts have displayed a rather liberal approach towards (entrepreneurial) mass litigation,<sup>17</sup> which is also visible in the rules on standing in a representative action and the courts’ assessment thereof. Few conditions apply for an entrepreneurial party to establish a representative organization and pursue collective redress also for its own profit. Where possible, courts seem to focus on the merits of the claim rather than the admissibility of the representative organization. Only recently, the judicial scrutiny has slightly increased, more specifically on the quality (professionalism) of the representative organization. This increased scrutiny has been incited by the legislative amendment in 2011 that has raised the bar for the admissibility of representative organizations. Nevertheless, an entrepreneurial party is not obliged to reveal its participation in the action, and the representative organization is not required to reveal the origin of the funds that it is going to use to support the action, nor is it subjected to criteria with regard to its financial means to meet any adverse costs should the

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<sup>16</sup> As discussed in section 7.3.4, see also hereafter.

<sup>17</sup> See section 7.3.3 and 7.3.4.

action fail. Finally, a safeguard that has been detected in WCAM settlements is that the proceeds are placed in a trust account and are distributed by an independent claims administrator.

The second variation of the representative action, bundled assignments, are mainly safeguarded by the rules on alienability as discussed in section 7.3.4.

The second route of entrepreneurial mass litigation is the involvement of an entrepreneurial party in a group action. Either a representative group member is appointed, or all – active – group members are the formal parties to the proceedings. The entrepreneurial party operates behind the scenes through contractual arrangements. Forms of such group actions are the German KapMuG and the English representative<sup>18</sup> action (CPR 19.6) and GLO. These mechanisms have been designed specifically for collective redress. For the group action, too, a second variation has been created in practice to obtain collective redress without a formal device: the group can be formed by the underlying mechanism of (bundled) powers of attorney or joinder. An entrepreneurial party might form such a group; however, it will not become a formal party to litigation. The third route is similar to the second one, and one that has been created in practice too: the involvement of an entrepreneurial party in bringing or supporting a test case. The verdict in such a case can serve as a precedent and might lead the way for others to reach a settlement with the liable party or to bring their own claim, whether or not collectively. In this way, potential claimants can save costs and await the outcome of the test case before deciding to file an action or enter into a settlement. Here too, an entrepreneurial party might be responsible for assembling the group, but it will not become a formal party to the litigation. The difference with the aforementioned group action is that one class member is the formal party and one case is brought, the test case. Here too, the involvement of an entrepreneurial party is not always easy to detect.

For the second and third route, as well as for the non-statutorily-based routes to obtain collective redress, the safeguards mainly lie in the regulation of the legal services market (section 7.3.2) and the construction of the funding arrangement (section 7.3.4). If, for instance, a code of conduct for entrepreneurial parties is lacking or does not address capital adequacy requirements or how to prevent or deal with conflicts of interests, instruments might be lacking to prevent (or punish) abusive behaviour by the entrepreneurial party. Class members (or defendants) are then forced to turn to more general rules of civil law. Two notable examples are the English defendants that successfully argued that a number of entrepreneurial parties were responsible for an abuse of rights by bringing a flagrantly unfounded claim, which was sanctioned by the court through the costs order (to be paid only by the entrepreneurial parties), and the Dutch case of an entrepreneurial SPV where class members successfully requested the court to dismiss the foundation's board.

### **7.3.6 The second overview: the distilled rules and features**

From the three country studies, I have distilled the following rules and features that potentially amplify or reduce the beneficial or disadvantageous operation of entrepreneurial mass litigation, per key issue addressed.

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<sup>18</sup> Here, representative refers to one or more class members that are appointed to represent the other class members.

Key issue	Distilled rule or feature
Introduction to the jurisdictions' civil justice landscapes	<ul style="list-style-type: none"> <li>- Case management techniques</li> <li>- Collective settlement and damage scheduling</li> <li>- Protection of individual rights</li> </ul>
The legal services market	<ul style="list-style-type: none"> <li>- The development of a claimants' bar</li> <li>- Legal or regulatory restrictions on the legal services market</li> <li>- Supervision of the legal services market</li> <li>- Entry barriers for entrepreneurial parties</li> <li>- Availability of legal expenses insurance</li> <li>- Professional rules for entrepreneurial parties <ul style="list-style-type: none"> <li>o Corporate governance</li> <li>o Audit committee for claim selection</li> <li>o Publicity and transparency</li> <li>o Capital adequacy requirements</li> </ul> </li> <li>- Professional liability rules</li> <li>- Civil liability for an abuse of rights</li> <li>- Extrajudicial qualification and control of entrepreneurial parties <ul style="list-style-type: none"> <li>o Qualification in advance</li> <li>o Media control</li> </ul> </li> </ul>
Private litigation funding	<ul style="list-style-type: none"> <li>- Liberal or strict rules on result-based fees</li> <li>- The entrepreneurial party acts as an additional key player (in addition to the legal representative)</li> <li>- The entrepreneurial party acts as a repeat player</li> <li>- Activity/passivity of the entrepreneurial party</li> <li>- Active judicial assessment of the funders' remuneration</li> <li>- Financial bonus for active class members</li> </ul>
Litigation costs and costs shifting	<ul style="list-style-type: none"> <li>- Predictable litigation costs (risk)</li> <li>- Exponential litigation costs (risk)</li> <li>- Level of indemnification of the litigation costs</li> <li>- Court control over the litigation costs</li> <li>- Cost sanctions for abusive behaviour</li> <li>- Liability (of non-parties) for adverse costs order</li> <li>- Security for costs or after-the-event insurance</li> </ul>
Specificities and safeguards of the national collective redress mechanisms	<ul style="list-style-type: none"> <li>- Rules on the standing of entrepreneurial parties</li> <li>- Judicial assessment of the standing of entrepreneurial parties</li> <li>- Disclosure of the identity of the entrepreneurial party, its financial means and/or its funding arrangement</li> <li>- Technique of including class members (opt-in or opt-out)</li> <li>- Possibility to stay individual proceedings</li> <li>- Possibility to file a competitive collective action</li> <li>- Appointment of a lead representative</li> <li>- Appointment of a trustee and/or claims administrator</li> <li>- Trust account</li> </ul>

Table XII Overview of the rules and features that (might) affect the operation of entrepreneurial mass litigation, per key issue

## 7.4 The relevant conditions for the contribution of entrepreneurial parties to the chosen objectives of collective redress

*In this last section, the aforementioned rules and features (Table XI) are qualified in light of the benefits and drawbacks of entrepreneurial mass litigation and the objectives of collective redress. Can the specific rule or feature be qualified as an opportunity or a threat, that is, does it amplify or reduce one (or more) benefit(s) or drawback(s) of entrepreneurial mass litigation, which, in turn, positively or negatively affects the objective(s) of collective redress (sub-question 4)? The threats and opportunities will be discussed per objective of collective redress. They are also included in the summarizing, third overview (Tables XII-XIV in section 7.4.4), which brings together the first and the 'qualified' second overview. Therewith, this section also answers the main research question: what conditions are relevant in assessing the likelihood of entrepreneurial parties contributing to the chosen objectives of collective redress?*

### 7.4.1 Objective A: deterrence

Alternatively or complementary to the objective of compensation, policy makers might focus on the objective of deterrence. An important feature in that respect is a collective redress market in which entrepreneurial parties actively search for and detect claims, assemble and organize the claims and class members, and enable the pursuit of such claims. Such activities might follow public enforcement, such as a decision from a competition authority. They facilitate access to justice, which is not only beneficial to the objective of compensation but also to that of deterrence, as it might increase the wrongdoer's internalization of the damage it has caused. This is particularly so in negative value claims, where the amount of individual damage does not outweigh the individual investment in litigation.

At the same time, the entrepreneurial parties' activities might increase the number of actions and create or sustain a claim culture, which negatively affects the objective of deterrence, in particular if it entails an increase in unmeritorious claims (creating overdeterrence, defensive behaviour and negatively impacting business). Rules on admissibility, to be addressed at the earliest occasion, can be implemented and/or strictly applied, as an opportunity to address or mitigate such a drawback. However, this does not address the extrajudicial activities of entrepreneurial parties. Excrescences can be prevented through implementing extrajudicial regulation and control of the legal services market, such as (supervision of the compliance with) a code of conduct and/or the qualification or designation of entrepreneurial parties in advance. Furthermore, internal monitoring tools, such as the existence of an audit committee ('wise elders' who assess the suitability of an action) can be implemented. Examples such as these are visible in England and Wales, the jurisdiction in which third-party litigation funding has developed into the most mature market for this specific type of entrepreneurial parties. Professional liability and the aforementioned governance rules on screening cases can also be considered an opportunity for the benefit of increasing the quality of claims. As observed, however, the thorough screening of entrepreneurial parties might lead to adverse selection, that is, they favour certain sizes or types of claims. The availability of alternative, competing types of funding and/or cross-subsidization in the costs and fee regime, such as in Germany, can be considered as opportunities to mitigate this risk.

As mentioned in the introduction to this chapter, an ‘exclusive representative’ rule can be qualified as a threat, as it might diminish the benefit of competing entrepreneurial parties. Competition is beneficial for, inter alia, the objective of deterrence, since it increases detecting and enforcing claims.

Monitoring rules for courts might alleviate conflicts of interest between class members and an entrepreneurial party (due to the formers’ lack of knowledge, skills or opportunity to control and evaluate the activities of the entrepreneurial party) and improve the accountability and transparency of entrepreneurial parties. Other opportunities to do so are more general rules of civil law, such as the possibility in the Netherlands (for defendants) to hold entrepreneurial parties liable for an abuse of a (procedural) right, or (for class members) to invoke corporate law rules.

#### **7.4.2 Objective B: compensation**

Let us now assume that the main objective of a specific collective redress mechanism is to provide for compensatory relief. Such a mechanism will probably also focus on efficiency, which might partly erode the objective of full compensation. To ensure that entrepreneurial parties can contribute to the objective of compensation, a policy maker should pay attention to, inter alia, the regulation of the legal services market and the rules on standing and result-based fees. If these rules are designed or applied in such a way that they restrict entrepreneurial parties in bringing or being involved in such action, they can be qualified as a threat to the facilitation of access to justice. An example thereof has been observed in Germany, where entrepreneurial parties were not allowed to bring bundled assignments. Similarly, in England and Wales, the – remains of the – common law torts of maintenance and champerty might prevent an entrepreneurial party from engaging in collective redress. If these rules or the interpretation thereof are too liberal, they can be considered a threat to the risks of a claim culture and abusive behaviour. However, with liberal rules, entrepreneurial parties might also create a competitive market. Furthermore, if they can operate under a result-based fee, it creates an alignment of interests. The emergence of such a market is visible in the Netherlands, where entrepreneurial SPVs are increasingly engaged in collective redress.

A competitive market can have a downward pressure on the fees and/or percentages charged, positively affecting the objective of compensation (the individual’s remaining compensation after the deduction of the litigation costs). However, such fees should be properly monitored, as otherwise they might be excessive, disproportionate and/or create the risk of collusive settlements, as was observed in some situations of English and Dutch entrepreneurial mass litigation. To help secure the alignment of interests, some (regulatory, judicial or supervisory) control over the entrepreneurial party’s remuneration is important. However, this depends on the chosen objective. If the main objective is compensation, the risk of the entrepreneurial party’s remuneration being ‘too large’ should be avoided or mitigated, but if the main objective is deterrence, it is less relevant which part of the proceeds are taken by the entrepreneurial party. If the entrepreneurial party acts as a repeat player and is an added player (a third-party funder), the alignment of interests is also amplified, as it can monitor the attorney’s behaviour and vice versa.

As discussed in the previous section, governance rules (and some form of supervision of the entrepreneurial parties’ adherence to such rules) can be considered an opportunity for the benefit of increasing the quality of claims. Here, too, the risk of adverse selection by way of a thorough screening of entrepreneurial parties can be mitigated by the availability of alternative, competing types of funding

and/or cross-subsidization in the costs regime. A threat to access to justice but an opportunity to diminish the risk of a fraudulent or insolvent entrepreneurial party are capital adequacy requirements, entry barriers, and allowing a defendant to apply for security for costs. To aid such an application, the court can order the claimants to disclose the identity of the funder.

### **7.4.3 Objective C: efficiency**

As discussed in the previous section, if the regulation of the legal services market and the rules on standing are (applied) liberal(ly), they can be considered a threat, as they might amplify the risks of a claim culture and abusive behaviour. This negatively affects the objective of efficiency as well, as (un-necessary) excessive litigation increases courts' workload and imposes higher costs on defendants and the judiciary or society at large. If such liberal application is combined with (supervised) governance rules, however, the quality of the claims of competing parties might be amplified, which might mediate the aforementioned negative effect on the objective of efficiency. Furthermore, case management techniques such as bundling competing actions can cure excessive litigation, and applying costs sanctions or full liability for costs in the case of abusive behaviour will repair the higher costs for defendants, and can thus be considered as opportunities.

Within the objective of efficiency it is furthermore important that entrepreneurial parties can act as repeat players and that a 'claimants' bar' is developed next to the – already existing – defendant's bar. If the entrepreneurial party acts as an 'extra' key player, fully independent from the attorney, it can monitor the attorney's behaviour and fees, and neutralize the information asymmetry between attorney and individuals. In a way, an entrepreneurial party can thus turn 'one-shot' consumers into repeat players. This is also beneficial for the quality of representation and equality of arms. The alignment between the entrepreneurial party and individual class members can take place through a contingency fee arrangement.

Entrepreneurial parties might also induce inefficient competition. For instance, an entrepreneurial party might only serve part of the class and the competing entrepreneurial parties might initiate various actions that concern one mass damage event. This inefficient competition harms the objective of efficiency and can thus be considered a drawback, and the open, unrestricted collective redress market poses a threat, as it worsens such a drawback. To mitigate the drawback of inefficient competition (and thus positively affect the objective of efficiency), rules on the appointment of a lead representative could be designed, as has been done in the recent legislative proposal for a Dutch collective action for damages. Such an 'exclusive representative' rule can thus be qualified as an opportunity. An opportunity for competition is a predictable litigation costs (risk) regime, as it helps entrepreneurial parties to calculate their risk.

A last threat to the risks of abusive litigation and claim culture is the full indemnification of litigation costs, as was the case in England and Wales for a decade. This increased excessive (satellite) litigation, and so affected the objective of efficiency.

### **7.4.4 The third overview: the building blocks of entrepreneurial mass litigation**

To summarize (and organize the plethora of) the objectives, potential effects, and rules and features in the aforementioned sections, the answer to the research question 'What conditions are relevant in



assessing the likelihood of entrepreneurial parties contributing to the chosen objectives of collective redress?’ can also be represented by the following tables.

OBJECTIVE A: DETERRENCE	Potentially beneficial effect of entrepreneurial mass litigation for the objective (benefit)	Rule or feature that potentially amplifies the effect (opportunity)	Rule or feature that potentially reduces the effect (threat)	Potentially disadvantageous effect of entrepreneurial mass litigation for the objective (risk)	Rule or feature that potentially amplifies the effect (threat)	Rule or feature that potentially reduces the effect (opportunity)
	Facilitate access to justice	Public enforcement (e.g. decision by the competition authority); Active EPs that detect claims and organize the claims and class members; Liberal rules on standing and result-based fees; Calculable costs; Full costs shifting; Bonus to participants	Opposite elements of those listed as opportunities; capital adequacy requirements, security for costs, and other entry barriers;	Fuel a claim culture	Over-enforcement (fine + compensation); Active EPs that detect claims and organize the claims and class members; Liberal rules on standing; No extrajudicial control; Ad hoc judicial control of funder;	Public authorization or court control on standing; Costs sanctions; Full costs shifting; Deontological rules; (supervision of) governance rules; internal monitoring rules
	Competition	Allowing 'closed' collective actions; predictable costs regime				
	Quality of claims	Governance rules; internal monitoring rules	Opposite element of the ones listed as an opportunity	Adverse selection (cherry picking)	Thorough claim screening	Availability of alternative funding; cross-subsidization in costs/fee regime
				Abusive behaviour (blackmail settlement, ambulance chasing, insufficient means)	No rules on solicitation and barratry; Opposite element of the ones listed as opportunity	Capital adequacy requirements, security for costs, and other entry barriers, trust account, rules on solicitation and barratry; high-calibre defence attorneys; media control
	Alignment of interests	Allowing result-based fees; Monitoring rules for courts on activities and fees of EPs, accountability and transparency	No (extra)judicial control of settlements or fees	Conflict of interests	No extrajudicial control of settlements or fees; Ad hoc parties	High-calibre defence attorneys; Governance rules for funders; Opposite elements of those listed as threats

Table XIII Overview of the benefits, risks, opportunities and threats of entrepreneurial mass litigation (Objective A: deterrence)

OBJECTIVE B: COMPENSATION	Potentially beneficial effect of entrepreneurial mass litigation for the objective (benefit)	Rule or feature that potentially amplifies the effect (opportunity)	Rule or feature that potentially reduces the effect (threat)	Potentially disadvantageous effect of entrepreneurial mass litigation for the objective (risk)	Rule or feature that potentially amplifies the effect (threat)	Rule or feature that potentially reduces the effect (opportunity)
	Facilitate access to justice	Public enforcement (e.g. decision by the competition authority); Active EPs that detect claims and organize the claims and class members; Liberal (application of) rules on standing and result-based fees; Predictable costs (risk);	Capital adequacy requirements, security for costs, and other entry barriers	Fuel a claim culture	Liberal (application of) rules on standing and result-based fees;	Rules on solicitation and barratry; Governance rules;
	Competition	Liberal (application of) rules on standing and result-based fees;	Lead representative; Capital adequacy requirements, high entry barriers (e.g. ALF),			
	Quality of claims	Governance rules (e.g. audit committee)		Adverse selection	Opposite elements of those listed as opportunities	Availability of alternative funding; cross-subsidization in cost/fee system
				Abusive behaviour (blackmail settlement, ambulance chasing, insufficient means)	No rules on solicitation and barratry; Opposite element of the ones listed as opportunity	Security for costs, disclose identity of EP, capital adequacy test, and other entry barriers; ATE insurance, class members liable for costs order, trust account
	Alignment of interests	Result-based fees; Judicial assessment of settlement and funder's fee; EP as repeat player and added player	Lack of monitoring	Conflict of interests (prematuration or collusive settlement)	No or marginal judicial assessment; no extrajudicial control; Bonus to participants; Competing actions (reverse auction);	Media control; code of conduct; opposite elements of those listed as threats

Table XIV Overview of the benefits, risks, opportunities and threats of entrepreneurial mass litigation (Objective B: compensation)

OBJECTIVE C: EFFICIENCY	Potentially beneficial effect of entrepreneurial mass litigation for the objective (benefit)	Rule or feature that potentially amplifies the effect (opportunity)	Rule or feature that potentially reduces the effect (threat)	Potentially disadvantageous effect of entrepreneurial mass litigation for the objective (risk)	Rule or feature that potentially amplifies the effect (threat)	Rule or feature that potentially reduces the effect (opportunity)
				Fuel a claim culture	Active EPs that detect claims and organize the claims and class members; Liberal (application of) rules on standing and result-based fees;	Case management techniques, bundling competing actions; Applying costs sanctions or full liability for costs in case of unnecessary litigation;
	Competition	Predictable costs regime	Lead representative	Inefficient competition	Open, unrestricted collective redress market; Allowing 'closed' collective actions; Lenient interruption of limitation period	Lead representative
	Quality of claims	(Supervision of) governance rules (e.g. audit committee)				
	(E)quality of arms	EP as repeat player and added player;		Abusive behaviour	Active EPs that detect claims and organize the claims and class members; Liberal (application of) rules on standing and result-based fees; Full costs shifting in combination with discretionary powers	Applying costs sanctions or full liability for costs in case of abusive behaviour
	Alignment of interests	Contingency fee; EP as repeat player and added player; Financial incentives in costs system to settle a case	Lack of control in decision-making process			

Table XV Overview of the benefits, risks, opportunities and threats of entrepreneurial mass litigation (Objective C: efficiency)

## 7.5 Envoi

With the analysis presented in section 7.4, the conditions have been presented that are relevant in assessing the likelihood of entrepreneurial parties contributing to the chosen objectives of collective redress. Although the overview presents concrete, existing rules and features, they have been abstracted from their national context. Therewith, the overview presents various specific routes to approach, regulate and/or review entrepreneurial mass litigation. Depending on the chosen normative framework – the pursued objective(s) of collective redress – the other building blocks might be balanced differently.

I recognize that abstracting the rules and features from their natural habitat is a risky enterprise, as the functioning of a rule or feature depends on the context in which it functions. I have done so in order to map and paint a bigger picture of entrepreneurial mass litigation. Nevertheless, the map should be approached with caution; thus, I have labelled the rules and features as *potential* threats and opportunities. To a certain extent, the country studies have tested the listed rules and features, and have sometimes revealed whether specific benefits or drawbacks have indeed taken place. Obviously, entrepreneurial mass litigation is a relatively new phenomenon in Europe; it is a moving target in a market that has not yet sufficiently matured. Thus, it is impossible to paint a complete picture. However, by mapping the (potential) scenarios of entrepreneurial mass litigation and exploring the German, English, and Dutch legal and practical context in which such scenarios would take or have taken place, the research project has aimed to appraise the potential benefits and drawbacks of entrepreneurial mass litigation within the context of (these) European jurisdictions' legal traditions.

The primary aim of the research project was to contribute to the academic, legislative or judicial process of weighing and balancing entrepreneurial mass litigation within its appropriate context, also in order to avoid ad hoc responses to incidents or scandals. Various 'situations' were passed in review: American, Australian, European, German, English and Dutch. Sometimes parties have stumbled over the building blocks, at other times legislators, courts or the public have done the same. It remains to be seen how they will develop in the future, but it is clear that the building blocks are available. Some might require fine-tuning, others restructuring or control. At all times, however, observing their place in the bigger picture is essential in order to keep it in balance.

## 8 Summary

In modern society, events occur in which the rights of large numbers of people are infringed, causing mass harm and disputes that concern various areas of private law and various types of aggrieved parties. Illustrative examples are the Volkswagen emissions scandal, the illegal dumping of toxic waste from the Probo Koala tanker, or the trucks price-fixing cartel. Mass litigation is a relatively new phenomenon in Europe, yet it is gradually developing into an important area of the law. Nowadays, most European member states have introduced some type of court-based collective redress mechanism. For the pursuit of collective redress, member states and the European Union primarily rely upon (semi-)public or private, non-profit representative bodies such as consumer organizations – as a more trusted alternative to the US entrepreneurial lawyer. Nevertheless, various types of commerce-driven parties are mushrooming, incentivised – also – by the potential large earnings that mass litigation provides. Attorneys, special purpose vehicles and third-party litigation funders increasingly engage in the already existing collective redress mechanisms and explore hidden or new pathways. Regardless of their type, their mere presence adds a key actor to the litigation who is – also – pursuing its own entrepreneurial interest. This innovation in private law is two-faced. Entrepreneurial mass litigation has the potential to stimulate and improve access to justice and private enforcement, but also to fuel a compensation culture and encourage abusive behaviour. This PhD project has addressed the question of what conditions are relevant in assessing the likelihood of entrepreneurial parties contributing to the chosen objectives of collective redress. It has done so by way of a theoretical and comparative legal study. The study has sought to appraise the potential benefits and drawbacks of entrepreneurial mass litigation within the context of three European jurisdictions' legal traditions (Germany, England & Wales, and the Netherlands), and to inventorise the particular rules and features that might affect entrepreneurial mass litigation. Therewith, the study has aimed to contribute to the academic, political and/or judicial process of accurately weighing and balancing the benefits and drawbacks of entrepreneurial mass litigation.

Part I of the thesis, which consists of Chapters 2 and 3, has established the study's foundation. Chapter 2 has described the collective redress mechanisms in the three selected jurisdictions and has investigated the policy objectives that underlie these mechanisms, as well as the European Union policy on collective redress. Although the German, English, and Dutch mechanisms vary, three common main policy objectives have been identified: i) to modify – potential – wrongdoers' behaviour (prevention and deterrence), ii) to restore the damage suffered by individual class members (compensation), and iii) to promote procedural economy (efficiency). The latter is a constant goal, aimed at by all mechanisms that have been designed over the years. As of the 1970s until recently, prevention has been the prime objective of collective redress; this policy developed in a rather similar way in the researched legal regimes, where the mechanisms mainly provided for injunctive relief. Currently, deterrence is still considered an important goal, but one to be pursued primarily by (the enforcers of) public law. It is relatively recently that providing individuals with the opportunity to obtain individual redress or compensation has gained ground as a goal of *collective* redress. It remains controversial, however, given its association with US class actions and the – alleged – adverse effects thereof.

Whereas Chapter 2 has focused on collective redress mechanisms, Chapter 3 has concentrated on entrepreneurial parties that (might) operate within that field. Based on American and Australian experiences with class actions, entrepreneurial lawyering and third-party litigation funding, and on law

and economics literature, the project has mapped potential scenarios of entrepreneurial mass litigation. Entrepreneurial mass litigation has been defined as the financing of (all or part of) the costs of mass litigation by a private party, in return for a share of the proceeds of the action or an uplifted fee; either way, only payable upon success. The research has distinguished three types of entrepreneurial parties: attorneys, ad hoc special purpose vehicles (SPVs) and third-party litigation funders. They might ‘merely’ fund the claim, but might also be actively involved in mass litigation by searching for potential claims, approaching and informing potential claimants, screening cases, participating in the (strategical) decision-making process, and initiating mass litigation themselves. Subsequently, the chapter has listed the benefits and drawbacks of entrepreneurial mass litigation as more or less opposite sides of the same coin, positively or negatively affecting the objective(s) of prevention/deterrence (a), compensation (b), or efficiency (c):

Potential benefits	Affected objective(s) (+)	Potential drawbacks	Affected objective(s) (-)
1. Facilitate access to justice	a, b	6. Fuel a claim culture	a, b, c
2. Competition	a, b, c	7. Inefficient competition	c
3. Increase the quality of claims	a, b, c	8. Adverse selection / cherry picking	a, b
4. (E)quality of arms	c	9. Abusive behaviour	a, b, c
5. Alignment of interests	a, b, c	10. Conflict of interests	a, b

The extent to which the aforementioned effects indeed occur interacts with the specificities of a national legal system. Therefore, part II of the research (Chapters 4, 5 and 6) has explored the German, English and Dutch legal and practical context in which such scenarios (might) take place. It describes the legal rules and features that are closely connected with and shape the operation of entrepreneurial mass litigation, by addressing the following key issues: 1) essentials of the civil justice landscape, 2) the regulation and supervision of the legal services market, 3) litigation costs and costs shifting, 4) private litigation funding, and 5) essentials of the collective action mechanisms. The findings have been summarized at the end of each chapter and comparatively observed in Chapter 7. The country studies show, for instance, that the German legal services market is the most strictly regulated one, for providing legal services both in and out of court. Moreover, the German legislator and courts appear to be more hesitant towards compensatory collective redress as compared to the Dutch and English ones. Consequentially, the development of entrepreneurial mass litigation differs considerably in the three jurisdictions. Whereas in Germany, entrepreneurial mass litigation has mainly – yet cautiously – taken place within the context of securities litigation, in the Netherlands, different types of claim vehicles are increasingly pursuing various types of mass harm disputes. The English experiences provide inspiration for the potential regulation thereof. The country study does not only show a growing market for entrepreneurial mass litigation, but also an increase in the (self-) regulation thereof. The UK government, for instance, has banned the practices of certain claim vehicles, and the litigation funding sector has issued a code of conduct.

Chapter 7 has also distilled various legal rules and features – abstracted from their national context – that potentially amplify or reduce the beneficial or disadvantageous effect of entrepreneurial mass

litigation,<sup>1</sup> and can thus be qualified as threats and opportunities against the backdrop of the objectives of collective redress mechanisms.<sup>2</sup> This framework brings together the findings of both parts of the research and presents the conditions that are relevant in assessing the likelihood of entrepreneurial parties contributing to the chosen objectives of collective redress. It displays the three sets of building blocks of entrepreneurial mass litigation: a) the rules and features, qualified as either an opportunity or a threat to b) the benefits and drawbacks of entrepreneurial mass litigation, c) modelled within the policy objectives of collective redress. The overview shows the manner in which the conditions are intertwined and the potential trade-offs. To give an example: competing entrepreneurial parties might initiate separate collective actions that concern the same mass damage event. Such competing actions harm the objective of efficiency, and can thus be considered as a drawback of entrepreneurial mass litigation (inefficient competition). Appointing a lead representative might reduce this drawback. Hence, the 'lead representative rule' can be qualified as an opportunity to the drawback and, in turn, positively affect the policy objective of efficiency. However, the same rule can also be qualified as a threat, as it might diminish the benefit of competing entrepreneurial parties. For instance, a competitive market can have downward pressure on the fees and/or percentages charged, positively affecting the objective of compensation (the individual's remaining compensation after the deduction of the litigation costs). A decline in the number of competing parties will reduce this positive effect.

The book closes with a call for a balanced approach. In the study, various 'situations' have been passed in review: American, Australian, European, German, English and Dutch, and specific routes have been presented to approach, regulate and/or review entrepreneurial mass litigation. In this process, the chosen normative framework – the pursued objective(s) of collective redress – determines the place and design of the other building blocks. The study shows that this process sometimes results in incidents which might require (further) regulation, the fine-tuning thereof or control thereon. At all times, however, observing the building blocks' place in the bigger picture is essential in order to keep it in balance.

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<sup>1</sup> See also table XII in Chapter 7.

<sup>2</sup> See also tables XIII-XV in Chapter 7.





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